Supreme Court, U.S.
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92-712

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

DAVID G. STAUFFACHER and

JOHN P. STAUFFACHER,

Petitioners

JOHN A. BENNETT and

FIRST HERITAGE SAVINGS CREDIT UNION,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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October 22, 1992

QUESTIONS PRESENTED

1.) Whether the trial court in the Western District of Wisconsin has and should exercise personal jurisdiction over Canadian defendants First Heritage Savings Credit Union ("First Heritage") and John Alexander Bennett ("Bennett"):

a.) Where an investment contract between plaintiffs and another co-defendant containing a broadly worded "consent to jurisdiction clause" naming the district court is approved, referenced by and/or ratified by accompanying and subsequent written trust contracts between the forum state plaintiffs ("Stauffachers") and defendant Bennett, (trust manager of defendant First Heritage) i.e. what degree of express or implied "consent" is required to subject defendants to personal jurisdiction in a business/investment contractual environment and when will references to other contracts containing a "consent" to jurisdiction clause satisfy due process?; and/or,

b.) Where there are factually detailed claims alleging the existence of both (i) a RICO enterprise and activities ;and, (ii) a separate but factually similar pendent State fraud and conspiracy claim, of which defendants First Heritage and Bennett are alleged as participants, and where two of the other Canadian original codefendant participants physically came to the forum State on behalf of the enterprise's (conspiracy's)

activities in attempting to negotiate investment and trust contracts with plaintiffs, which written trust contracts eventually were between Bennett of First Heritage as trustee and the Wisconsin resident plaintiff as beneficiary?; and/or,

c.) Where in connection with plaintiffs' investments into two gold mining placer mineral leases, Bennett (of First Heritage) is the trustee and the Wisconsin plaintiff's the beneficiary under two seperate mineral lease trust agreements which also require that documents of title and cash flows generated from the leases be transferred by the Canadian trustee by Certified Mail to the Wisconsin forum plaintiffs?; and/or,

d.) Where a claim seperate from the RICO claim is made against defendants for violations of duties to disclose under federal securities laws and worldwide service of process is asserted as applicable under 15 U.S.C. 78 (a) (a) and Fed. R. Civ. Pr. 4(e) and 4(f), despite the nationwide service of process limitations for RICO claims in 18 U.S.C. 1965 (b)?; and/or,

e.) Where facsimile transmissions of contracts and documents from Canada to the forum state located plaintiffs were used by other original co-defendants to transmit deliver, and verify Bennett's signatures to the two trust agreements and where the transmitting co-defendant is alleged as an agent of Bennett for

purposes of the transmission of the contracts to plaintiff and to obtain investment funds from plaintiff; and/or,

f.) As a direct result of plaintiff's receipt in Wisconsin of the above described facsimile transmissions of the trust agreements bearing Bennett's signature, plaintiffs would, as agreed, go to designated Wisconsin Banks to provide credit and/or borrow money to send to deposit into First Heritage?; and/or,

g.) Where defendants are alleged to have "purposefully availed themselves of the benefits and protections of Wisconsin laws" where the plaintiffs provided local credit and guaranteed loans at specifically and contractually designated Wisconsin Banks to another original codefendant and memeber of the alleged enterprise and conspiracy, and which loan guarantee agreement was approved or ratified by the subsequent written trust agreement signed by Bennett, and which loan guarantee proceeds where deposited, as agreed by Bennett, into First Heritage?; and/or,

h.) Where defendants' activities and omissions are alleged to have forseeably caused damage to plaintiff's local credit and associated debt burdens to plaintiffs and to plaintiffs' forum state hotel business?; and/or,

i.) Where over $2,500,000 (U.S.) in

deposits from Wisconsin plaintiffs are, in themselves, substantial and not isolated business to the reletivly small western Canadian credit union, First Heritage of the Town of Hope, B.C., Canada (population 3200)?; and/or,

j.) Whether (in addition to the contacts and contracts with the forum State plaintiffs) the defendants' admission that First Heritage has depositers living in the State of Washington, when all the contacts are taken together, are such minimum contacts with the United States to confer personal jurisdiction over Bennett and First Heritage in this federal action ?

2a.) The degree of specificity of conspiracy (and agency) allegations necessary to support a theory of attribution of the jurisdictional contacts made by other original co-defendants in order to obtain personal jurisdiction over alleged co-conspirators First Heritage and Bennett?

b.) Whether personal jurisdiction can be obtained over co-conspirators First Heritage and Bennett under principles of agency when (i) the court has personal jurisdiction over other original members of the conspiracy, and (ii) two lease trust contracts exist between Bennett and plaintiffs, and (iii) substantial deposits are made available by plaintiff for deposit, as agreed, into First Heritage, and (iv) defendant First

Heritage has some unrelated depositers living in the State of Washington?

c.) Whether activities by coconspirators and agents can satisfy the "purposeful availment" requirement of a defendant as identified by this court in Burger King Corp. v. Rudzewicz, , 471 U.S. 462,471,(1985) and Ashahi Metal Industry Co. v. Superior Court , 480 U.S. 102, 109, (1987)?; and,

d.) What number or other measure of significance of contracts and contacts with the form plaintiffs (or contacts with the United States) are required before personal jurisdiction will lie?

3.) Whether the appellate court erred in not considering (as a basis for personal jurisdiction) Bennett's signatures affixed to the two investment trust agreements with plaintiff(s)?

4.) Whether the appellate court erred in not considering (as a basis for personal jurisdiction) Bennett's written ratification or approval (in November of 1989) of the October 12, 1989 Second Joint Venture Agreement which was also executed in Madison, Wisconsin by original co-defendant and alleged co-conspirator Dolan and the forum plaintiff Stauffacher?

5.) Whether, under the facts as alleged, the two trust and gold mining mineral

lease investments offered to plaintiffs are securities under 15 U.S.C. 78 (c)(a)(10); Cascade Energy and Metals Corp. v Banks, C.C.H. Fed. Sec.L.Reg. paragraph #94955 (10th Cir. 1990); S.E.C. v. W.J. Howey Co., 328 U.S. 293 (1946)?

LIST OF PARTIES

The remaining parties to this proceeding are contained in the caption. (Default judgment was granted against original co-defendant Donald J. Dolan after hearing in the district court to perfect same. Original co-defendants Douglas J. Livesey and James M. Howard were dismissed by stipulation but over whom the district court exercised personal jurisdiction.)

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

DAVID G. STUAFFACHER and JOHN P. STAUFFACHER,
Petitioners

v.

JOHN A. BENNETT and FIRST HERITAGE SAVINGS CREDIT UNION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioners David G. Stauffacher and John P. Stauffacher respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled proceeding on July 28, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit in #91-3023 is reported at 969 F.2d.455 (1992) , and is

reprinted in the appendix hereto, p.1(a) -10(a) , infra. The memorandum decision of the United States District Court for the Western District of Wisconsin (Shabaz,J.,) has not been reported. It is reprinted in the appendix hereto, p.11(a)-32(a) , infra.

JURISDICTIONAL STATEMENT

The jurisdiction of the Court to review the judgment of the Seventh Circuit is invoked under 28 U.S.C.1254 (1).

The district court has federal question jurisdiction under 28 U.S.C. 1331. Plaintiffs David G. Stauffacher ("STAUFFACHER" or "D. STAUFFACHER") and John P. Stauffacher ("J. STAUFFACHER") sued defendants First Heritage Savings Credit Union ("FIRST HERITAGE"), John

Alexander Bennett ("BENNETT") and others in a multiple count civil complaint:

> (a) under the Federal Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1964(a) and (c); 18 U.S.C. 1341; 18 U.S. C. 1343; and,
>
> (b) in a pendent claim under the Wisconsin Organized Crime Control Act, Wis. Stats. 946.87(4); and,
>
> (c) for damages in securities fraud in violation of Section 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. 78(j)(b); 15 U.S.C. 77(v)(a); 15 U.S.C. 78(a)(a) and Rule 10(b)(5), 17 C.F.R. 240.10(b)(5); and,
>
> (d) in a pendent claim under Wis. Stats. 551.59 for violation of Wisconsin Uniform Securities Law, Wis. Stats. 551.41; and,
>
> (e) in a pendent claim for breach of fiduciary duty, breach of duty of good faith; and, as their tenth claim, for fraud and conspiracy to commit fraud .

Plaintiffs are Wisconsin residents and United States citizens. Defendant FIRST HERITAGE is a Canadian credit union with offices in the Town of Hope, B.C. Defendant BENNETT is a Canadian citizen

from Hope, B.C. and is the trust manager and an officer of corporate defendant FIRST HERITAGE. BENNETT also manages defendant FIRST HERITAGE. The amount in controversey in this matter is approximately $4,000,000. Original defendant James M. Howard ("HOWARD") is a U.S. citizen from Cleveland, Ohio. Original defendant Douglas J. Livesey ("LIVESEY") is a Canadian citizen from Vancouver, B.C., Canada, and over which the district court found personal jurisdiction.

Jurisdiction over the subject matter is alleged under 28 U.S.C. 1331 and, alternatively, under 28 U.S.C. 1332 (as the case may be for each particular claim).

Federal subject matter jurisdiction, venue, personal jurisdiction, and the

right of plaintiffs to utilize extraterritorial service of process was alleged over Canadian defendants FIRST HERITAGE and BENNETT as a result of Section 22 of the Securities Act and Section 27 of the Securities Exchange Act, 15 U.S.C. 77(v)(a), 15 U.S.C. 78(a)(a), and Fed R.Civ.Pr. 4 (e) and (f) since Canadian defendants BENNETT and FIRST HERITAGE may be sued in the Western District of Wisconsin under 28 U.S.C. 1391(d). As permitted by Fed. R. Civ.Pr. 4(d) and 4(e), Wisconsin law also was alleged to permit the exercise of personal jurisdiction over these Canadian defendants under Wis. Stats. 801.05(1)(d); 801.05(4)(a); 801.05(4)(b); 801.05(5)(a); 801.05(5)(b); 801.05(1)(d); 801.05(5)(e) and/or 801.05(10)(a). The exercise of jurisdiction by the district court in this matter over defendants FIRST

HERITAGE and BENNETT was alleged as not violative of the due process clauses of U.S. CONST. amend. V and U.S. CONST. amend. XIV.

The district court's April 19, 1991 order granting defendant FIRST HERITAGE's Motion to Dismiss for want of personal jurisdiction was incorporated into the Order for Final Judgment dated July 30, 1991 and entered July 31, 1991 and was appealed under Fed.R.Ap.Pr. 4(a)(1). The district court's May 31, 1991 order dismissed BENNETT on the same grounds as FIRST HERITAGE. No petition for rehearing was sought to the appellate decision. The jurisdiction of the Supreme Court to review the judgment of the Seventh Circuit is invoked under 28 U.S.C. 1254 (1).

STATUTES INVOLVED

<*Text of the statutes listed below is in appendix, p.33(a)

15 U.S.C. 78 (a)(a)

15 U.S.C. 78 (c)(a)(10)

18 U.S.C. 1965 (b)

Fed.R.Civ.Pr. 4(e)

Fed.R.Civ Pr. 4(f)

Wis. Stats. 801.05 (1)(d)

Wis. Stats. 801.05 (4)(a)

Wis. Stats. 801.05 (5)(b)

STATEMENT OF THE CASE

Plaintiffs commenced the action 10/18/90 in the Western District of Wisconsin #90-C-0771S under various claims generally described under the preceeding Jurisdictional Statement section of this petition, which also contains its procedural history.

Plaintiffs DAVID AND JOHN STAUFFACHER are investors from Madison, Wisconsin. Original Defendant DONALD J. DOLAN ("DON DOLAN") is by occupation a miner, mining business operator, and an investment

capital procurer from Hope, British Columbia, Canada. Original Defendant DOUGLAS J. LIVESEY ("LIVESEY") is by occupation an attorney, businessman, and mining business operator from North VanCouver, British Columbia, Canada. Defendant JOHN ALEXANDER BENNETT ("BENNETT" or "Bennett") is a resident of Hope, British Columbia, Canada, and is by occupation a trust company manager and bank trust officer at FIRST HERITAGE SAVINGS CREDIT UNION. Defendant FIRST HERITAGE SAVINGS CREDIT UNION ("FIRST HERITAGE") is a credit union which performs banking and trust services and is located in Hope, British Columbia, Canada. FIRST HERITAGE is in the business of taking deposits, making loans, and providing financial services. Plaintiffs D. STAUFFACHER and J. STAUFFACHER and Defendant DON DOLAN entered into various

agreements wherein D. STAUFFACHER and J. STAUFFACHER invested approximately $4,000,000 in two seperate gold mining joint venture investments promoted by defendant DON DOLAN and the other defendants on 2 separate mineral leases lying along a bank of the Fraser River in Hope, B.C., Canada. The first joint venture involved 40 acre placer gold mining mineral lease (PL #1494), entered into in mesne agreements from 5/10/89 to 5/24/89. ("First Joint Venture Agreement"). Bennett (of First Heritage) signed the trust portions of the First Joint Venture agreement and was the lease title and cash flow trustee.*

<*Exhibits to the document Bennett signed (Comp.Exh.#2,p.7) reads "...the Joint Venture described herein shall operate as a partnership would if it had been formed under Chapter 178 of the Wisconsin (USA) Statutes...". The contemporaneously executed First Joint Venture Agreement itself reads (at Comp. Exh.1,p.13) "20...Any controversy or claim arising out of or relating to this Partnership

Agreement shall be settled by the Federal United States District Court of the Western District of Wisconsin.">

During negotiations in April and May of 1989 for the First Joint Venture Agreement, defendants DON DOLAN, HOWARD, and defendant BENNETT of FIRST HERITAGE informed D. STAUFFACHER that the mineral lease title to PL #1494 (40 acre lease) had to be held in the name of a Canadian individual who also held a Canadian government issued Miner's Certificate. It was therefore agreed by D. STAUFFACHER, DON DOLAN and BENNETT, that the bank corporate officer and trust manager of FIRST HERITAGE, Defendant BENNETT, would hold the title to the mining lease PL #1494 (40 Acres) in trust for D. STAUFFACHER in BENNETT's own name as an "individual" (rather than in the name of FIRST HERITAGE). Further, it was agreed that DON DOLAN and BENNETT of FIRST

HERITAGE would obtain any necessary lease and mining permits.*

> <*The Appellate Court incorrectly "found" that Bennett was not a party to any written contracts with Stauffacher: A,p.2(a) ("parties were the Stauffachers and Dolan"); A,p.5(a) ("First Heritage and Bennett are not parties to the agreement".) The Seventh Circuit's implication that there were no written agreements between Bennett and D. Stauffacher is erroneous and, plaintiffs contend, this finding goes right to the heart of the personal jurisdiction issue.>

A second joint venture investment agreement involving a 100 acre gold mining lease property (PL #2804) also lying along the bank of the Fraser River in Hope, B.C., Canada, was negotiated between July through November of 1989. A "Second Joint Venture Agreement" dated October 12, 1989 was signed in Madison, Wisconsin by Dolan and Stauffacher for the 100 acres (PL #2804) and involved the second $1,500,000 (plus) invested by D. STAUFFACHER and J.

STAUFFACHER. Accordingly, BENNETT of FIRST HERITAGE, LIVESEY, DON DOLAN and plaintiff D. STAUFFACHER (for himself and/or all plaintiffs) in November of 1989 entered into the written agreement partially evidencing the trust relationship in favor of D. STAUFFACHER for mining lease PL #2804 pursuant to and for the October 12, 1989 Second Joint Venture Agreement.*

> <*The Second Joint Venture Agreement dated October 12, 1989, at Comp. Exh. #3, p. 4, requires submission to and approval by Bennett as trustee and, at p. 3, requires that the terms of the First Joint Venture Agreement of 5/24/89 to be incorporated into it. (The First Joint Venture contains the broadly worded consent to jurisdiction clause.) Bennett's approval of these terms is evidenced by his signature to the Nov. 1989 written trust agreement in Comp. Exh. #4.>

Defendants (including BENNETT and FIRST HERITAGE) allowed the 40 acre lease (PL #1494) to lapse and expire on February 26,

1990. Defendants (including BENNETT and FIRST HERITAGE) also allowed the 100 acre lease (PL #2804) to lapse and expire on February 21, 1990. These lapses resulted from non-renewal for failing to pay annual fees and failing to file informational reports with the Gold Commissioner's Office of the Province of British Columbia, Canada. Prior to the investments and as security for the repayment of the first $1,000,000 invested in May of 1989 pursuant to the First Joint Venture Agreement, D. STAUFFACHER requested of DON DOLAN that DON DOLAN engage a bank (or other major legitimate business institution) to act as trustee. The trustee was to hold and maintain the mineral lease title to PL #1494 (40 acres) so that the trust asset would be protected and also so that a forfeiture of the trust asset would occur to D. STAUFFACHER as

beneficiary in the event of any default in repayment by DON DOLAN. In May, 1989, D. STAUFFACHER, as beneficiary, and BENNETT of FIRST HERITAGE as trustee, did enter into the trust relationship in order to secure the repayment of the $1,000,000 (US) by DON DOLAN to D. STAUFFACHER as part of the First Joint Venture Agreement. The rest of the trust was to be the ownership of PL #1494. DON DOLAN was, in May of 1989 and all other relevant times, a customer of FIRST HERITAGE and indicated to BENNETT and D. STAUFFACHER of DON DOLAN's intent to use FIRST HERITAGE as the primary business banking account for the first joint mining venture between DON DOLAN and D. STAUFFACHER. BENNETT of FIRST HERITAGE knew that the funds invested by D. STAUFFACHER would be placed into business accounts at FIRST HERITAGE. DON DOLAN and D. STAUFFACHER

did deposit portions of the D. STAUFFACHER first joint venture $1,000,000 investment proceeds and the second joint venture $1,500,000 investments proceeds into a business account (or other accounts) at FIRST HERITAGE. Further, and pursuant to BENNETT's solicitation, D. STAUFFACHER and J. STAUFFACHER opened another business account under the name "Stauffacher Canadian #1" with FIRST HERITAGE. Plaintiffs alleged that BENNETT was, on May 24, 1989, personally aware of an existing adverse interest in PL#1894 of another party when BENNETT accepted ownership of the lease as trustee for D. STAUFFACHER, and yet BENNETT failed to disclose knowledge of this adverse interest to D. STAUFFACHER. BENNETT was also personally aware on May 24, 1989 that (a.) DON DOLAN had lost or failed to successfully manage substantial

portions of other investors' money in various other previously already failed mining ventures and (b.) that DON DOLAN had already failed in operating this same mineral lease #PL 1494. BENNETT had this knowledge when he accepted ownership to PL #1494 (40 Acres lease) as trustee for the benefit of D. STAUFFACHER, yet BENNETT failed to disclose this knowledge of DON DOLAN's prior mining business or investment failures. BENNETT and FIRST HERITAGE knew, or should have known, that D. STAUFFACHER was unaware of the lapsing of the PL #1494 and PL #2804 and of the actual filing of adverse interest litigation in Canada against the trust property, and yet trustee BENNETT and FIRST HERITAGE failed to disclose same in a telephone call Bennett made in April of 1990 from Canada to D. STAUFFACHER. Instead BENNETT of FIRST HERITAGE

specifically requested of D. STAUFFACHER to be let "out of the trust relationships" because of his bank's (FIRST HERITAGE'S) "concerns". Further, BENNETT intended as early as 1988 to go into the mining business with DON DOLAN, both prior to and during the trust relationship with plaintiffs. Such conflicting business motives were not disclosed by BENNETT of FIRST HERITAGE to D. STAUFFACHER. STAUFFACHER, as a result of providing millions of dollars in deposits into FIRST HERITAGE, is one of the most significant depositors that First Heritage has ever had. Hope, B.C., Canada is a relatively small town (population 3200). D. STAUFFACHER disputed and denied Bennett Affidavit-paragraph #4, which implied that the trust closings all occurred in Canada. The November, 1989 trust document for the "100 Acres" was offered to STAUFFACHER

while STAUFFACHER was in Madison, Wisconsin. This document (containing Bennett's signature) was executed in Canada by BENNETT and faxed (by LIVESEY from Canada) to STAUFFACHER's office in Madison, Wisconsin. STAUFFACHER was thereby prompted to also execute it and borrow $650,000 from the Bank of Sun Prairie, WI, which money was deposited into FIRST HERITAGE. (LIVESEY, at the time of the November, 1989 document execution, faxing, and money transferring, was acting as agent for DOLAN, BENNETT and STAUFFACHER.) LIVESEY and DOLAN were separately and physically in Wisconsin to negotiate (on BENNETTS' behalf) the Second Joint Venture Agreement.*,**

<*As to Dolan's agency relationship with Bennett and First Heritage: (i) Dolan's "banker" was to be the trustee; (ii) there was an agency relationship alleged between Dolan and his banker, Bennett which was raised in the argument

of plaintiffs in the District Court below>.

<** As to Livesey's agency relationship with Bennett and First Heritage, at the bottom of page 14 of that plaintiffs' 3/19/91 Trial Court Brief, it states.

> "That agreement [the November, 1989 Lease Title Transfer Agreement in Complaint Exh. #4 ...] was faxed back to Stauffacher in Madison, Wisconsin by Defendant Livesey, who was at the time acting as agent to obtain Bennett's signature and to transmit documents and funds." "Livesey, at the time of the November, 1989 document execution, faxing, and money transferring, was acting as agent for Dolan, Bennett, and Stauffacher." (emphasis supplied).>

First Heritage is described as part of a RICO "enterprise" at Complaint, page 24:

> "because they enjoyed the use of some of the racketeering proceeds in the course of the operation of their otherwise legitimate businesses and/or they enjoyed the use of these proceeds with actual, constructive or reasonably inferred knowledge that the proceeds were derived from racketeering activities."

At Complaint, page 25, the "enterprise" of the defendants is further identified:

"35.) Enterprise Having Defacto Continuity as a Business and Having Created a Pattern of Racketeering Activity: DON DOLAN's ongoing and continuous method of mining activities, DON DOLAN'S fraudulent investment capital raising efforts against others and particularly against the plaintiffs for the 2 separate joint ventures described in Complaint paragraphs #18 and 27, and Don Dolan's efforts to wrest the 2 separate mineral claim assets from D. STAUFFACHER and J. STAUFFACHER by employing the services of and using the conduct of LIVESEY, HOWARD, BENNETT, FIRST HERITAGE, Hope Placer, Peter Zimmerman, Darryl Gilles, Peter Osha, Douglas Dolan, Elsie Dolan, Else Don Company and Quesnel constituted an enterprise within the meaning of 18 U.S.C. 1961 (hereafter the "enterprise"). This enterprise group had de facto continuity as a business. The "intended" regular business of the enterprise was to operate a mining business. The enterprise also, however, conducted the racketeering activities through it's participants as described herein. Further, the members of the "enterprise" also carried on their regular individual businesses in addition to participating in the DON DOLAN "enterprise" in one way or another. The separate and distinct pattern of racketeering activity occurred by and in the manner in which the enterprise breached contracts, misled, extorted and/or defrauded the investor-plaintiffs (and others) as more particularly described herein.

> Alternatively, the defendants (and their agents) as members of the enterprise conspired to violate the predicate RICO offenses enumerated herein in order to effectuate the Plan which also amounted to a prohibited pattern of racketeering activity under 18 U.S.C. 1962(d)." (emphasis to defendants BENNETT and FIRST HERITAGE added)"

At Complaint, page 26, it is the specific defendants' enterprise activities which are alleged to have affected U.S. interstate commerce (and also commerce within Wisconsin) which are identified and described, not just the individual conduct of Bennett nor of First Heritage nor particularly as to the specific conduct of any one of the defendants as individuals: At complaint, p.26:

> "36.) Activities Affecting Interstate Commerce: As examples of defendants enterprise activities which affected interstate commerce:" <emphasis added>
>
> "36(a.) DON DOLAN in early October 1989, and LIVESEY in late October of 1989 and again in January of 1990, each personally traveled to Madison, WI, to the offices of D. STAUFFACHER

in efforts to continue to sell and effectuate the 2 separate million dollar-plus joint venture and investment agreements; and"

"36(b.) During DON DOLAN's travels to Madison, WI, DON DOLAN made significant misrepresentations to D. STAUFFACHER, [described in Complaint paragraph #29.] Also on several occasions misrepresentations were made to D. STAUFFACHER in Madison, WI by use of the telephone and telephonic facsimile transmissions systems, [including by DON DOLAN as described in Complaint paragraphs #19-26 and #37(c)(vii) and including by LIVESEY as described in Complaint paragraphs #37(c)(iii), 37(C)(iv), 37(c)(v) and 37(c)(vi); and by use of the mail system including by DON DOLAN in Complaint paragraph #37(c)(vii) and including by LIVESEY in Complaint paragraph #37(c)(viii) in order to effectuate and carry-out many of the various aspects of the Plan."

"36(c.) HOWARD generally operated out of Cleveland, OH, but contacted Mr. Stauffacher many times by interstate telephone and facsimile during the investment sales efforts. Further, HOWARD was physically present at various meetings with D. STAUFFACHER in Cleveland, OH. HOWARD was present at the face-to-face meeting in Hope, B.C., Canada on May 2, 1989 and thereby participated in and reassured D. STAUFFACHER as to the various representations made to D. STAUFFACHER as described in Complaint paragraphs #19-26."

> "36(d.) BENNETT, and BENNETT on behalf of FIRST HERITAGE, engaged in activities affecting interstate commerce as described in Complaint paragraphs #72 and 76-80. Further, BENNETT and BENNETT on behalf of FIRST HERITAGE executed trust agreements with the forum district resident plaintiffs, some of which are as described and identfied in Complaint paragraph #25 (i.e. May 24, 1989 trust agreement in Complaint Exhibit #2) and Complaint paragraph #28 (i.e. Complaint Exhibit #2 as well as the second November, 1989 trust agreement in Complaint Exhibit #4)."

Accordingly, Dolan, Livesey and Howard were alleged to have acted on behalf of the enterprise. Defendant Howard was also alleged and inferred in the Complaint as a U.S. representative and agent of the "enterprise" operating both in Cleveland and in Canada while these continuing investments and various investment decisions were being made by the plaintiffs.

BENNETT was alleged to have ratified the Second Joint Venture Agreement (in

Complaint Exhibit #3) which was negotiated and signed by Dolan in Madison, Wisconsin, on October 12, 1992, by signing the Nov., 1989 trust agreement in Complaint Exhibit #4. The agreements required some forum State performance by the trustee.*

> <*e.g. required certified mail delivery of title documents by the trustee to Stauffacher in Madison, Wisconsin (there is no "certified mail" service in Canada and hence requires U.S. laws and protections) and required delivery by the trustee of all Joint Venture cash flow to STAUFFACHER in Madison, Wisconsin.>

D. Stauffacher disputes and denies Bennett Affidavit-paragraph #6 which states that BENNETT never conducted business in Wisconsin. The "business" conducted by BENNETT with STAUFFACHER in Wisconsin resulted in millions of dollars being deposited into FIRST HERITAGE for the two investments and trust arrangements. Plaintiffs also opened another account at FIRST HERITAGE into which Plaintiffs had

more-or-less continually deposited significant sums of money from Wisconsin. STAUFFACHER, while in Madison, WI, sent over $100,000 into this other account in the course of the past two years. Currency exchange functions were performed by FIRST HERITAGE on STAUFFACHER's behalf, and while STAUFFACHER was in Madison, WI. BENNETT participated in the two separate investment trust transactions and, as a result in each case, the same or next day D. STAUFFACHER borrowed substantial amounts of money from designated Wisconsin Banks <i.e. the October 12, Second Joint Venture Agreement specially required Stauffacher to guarantee Dolan loans at First Wisconsin National Bank> and transferred investment funds from Wisconsin to Canada, which funds were deposited, as agreed, into FIRST HERITAGE, of which BENNETT was manager. BENNETT

specifically represented to D. STAUFFACHER during negotations that BENNETT agreed to act as trustee specifically so that the deposits of STAUFFACHER's Wisconsin borrowed investment money would be made into Defendant FIRST HERITAGE. BENNETT and FIRST HERITAGE knew, or should have known, of the lapsing of the leases in February of 1990, but failed to disclose same to STAUFFACHER in the April of 1990 phone conversation to Madison, Wisconsin. STAUFFACHER was also precluded by this nondisclosure from being able to at least try to make fee payments, and from filing reports as required by the Canadian Gold Commissioner to prevent the lease lapsings. The debt STAUFFACHER has incurred as a result of First Heritage's conduct (through Bennett) negatively affects STAUFFACHER's Wisconsin based

hotel business. As to other conspiracy allegations: The tenth claim of plaintiffs' complaint <p.57-58> is for fraud, realleges most of the RICO securities fraud and breach of duty of trust and duty of good faith allegations and, further, alleges that "defendants" conspired... to intentionally and deceitfully obtain approximately $4,000,000 from plaintiffs...(and)..the combined efforts of the defendants effectivly operated to defraud, and as a deceit on, plaintiffs". At Comp. p.38, "...defendants and/or there agents conspired at various times to violate the laws enumerated above..." At Comp.,p.,35 "multiple violations of 18 USC 1341 and 18 USC 1343, by the mailing and facsimile telephonic transmissions of documents.. to D. Stauffacher in order to obtain signatures...to the two trust agreements."

At Comp.p.19: "All of the defendants...utilization of a bank trust officer (Bennett of First Heritage) to act as a trustee and minor, and thereby to "cloak" the defendant Don Dolan with the credibility of a financial institution...in this way BENNETT, FIRST HERITAGE, LIVESEY, AND HOWARD aided and abetted, conspired to, and perpetuated the myth of Don Dolan as being legitimate."

REASONS FOR GRANTING THE WRIT

Important unsettled questions of federal law are present in this international and multi-contract, securities, civil conspiracy, fraud, banking, and credit provision case:

1.) The explosive degree to which the use of facsimile machines to effectuate contract negotiation, delivery and course

of dealing has since 1985 expanded the ability to do business quickly and globaly. The notions and concepts of the due process "net" in a contractual context under U.S.Const. amend. V and U.S. Const. amend. XIV must expand accordingly. <Ct. of Appeals declined to consider this issue at A,p.4(a) since the Stauffachers physically went at one point of negotiations to Canada. The record shows that the October 12, 1989 Second Joint Venture agreement executed in Madison was ratified and approved by the November, 1989 trust agreement. This was signed by Bennett while in Canada, faxed by Bennett's agent Livesey to Madison and which facsimile had the direct, immediate and forseeable consequence of "cloaking" Dolan with the credibility of financial institution First Heritage through its trust officer Bennett, causing the

Stauffachers to borrow from designated Wisconsin banks for forwarding to deposit into First Heritage. Assuming the mineral trusts were securities under 15 U.S.C. 78 (c)(a)(10), these investment documents were clearly delivered by fax into Wisconsin. Someone with a fax machine halfway around the world today can do more damage (in this case, in Wisconsin) and cause more people to invest money (in this case, from Wisconsin) than could have been imagined just years ago. These are not even like Telexes or regular phone conversations, these facsimiles transmitted detailed trust agreements which were signed and accepted by both parties and which had been submitted to Bennett for his approval of the contract requiring Stauffacher's First Wisconsin loan guarantee.

A split of authority exists in the

Circuits over what types of telecommunications into a state are required to confer personal jurisdiction. Lakeside Bridge and Steel Co. v Mountain State Constitution Co., Inc., 597 F.2d 596, 600 604 (7th Cir. 1979) cert. denied 445 U.S. 907, (1980) (telecommunication's into the forum state may be a factor to consider if the document is accepted in the state without modification); Cf. Charia v Cigarette Racing Team, 583 F.2d 184, 187-88 (5th Cir.1978) and Benjamin v Western Boat Building Corp., 472 F.2d 723,728-30 (5th Cir. 1973) (communications between parties are not "purposeful availment activities"). The district court <A, p.23(a) > stated "phone contact was not instrumental in negotiating the agreements." This is not what the record shows. The contracts faxed into Wisconsin were the agreements. While the court

eventually declined to find jurisdiction in Lakeside, 597 F.2d, at 603, p.13, the court noted:

> "We express no opinion on whether the result would be different if the contract required the plaintiff to perform in the forum state or if the nature of the plaintiff's obligations made performance in the forum state necessary".

The Stauffachers could only guarantee First Wisconsin National Bank loans in Wisconsin.

2.) The specificity to which an agency/ conspiracy theory must be alleged was acknowledged by the Seventh Circuit <A,p.7(a)-8(a)> to be in conflict between the circuits. Chrysler Corp. v Fedders Corp., 643 F.2d 1229, 1236-37 (6th Cir., 1981); Chandler v Barclays Bank PLC, 898 F.2d 1148,1155 n.3 (6th Cir. 1990); Ecclesiastical Order of the Ism of Am, Inc. v Chasin, 845 F.2d. 113,116 (6th Cir. 1988) (per curiam); Edmond v United

Postal Service General Counsel, 949 F.2d415, 424-27 (D.C. Cir. 1991); First Chicago International v United Exchange Co., 836 F.2d. 1375, 1377-79 (D.C. Cir. 1988) and Naartex Consulting Corp. v Watt, 722 F.2d 779, 787-88 (D.C. Cir. 1983). The Seventh Circuit declined at A,p.8(a) to resolve the conflict because of plaintiffs "failure" to raise an agency/conspiracy theory of personal jurisdiction. Plaintiffs, however, did allege that all defendants conspiried to commit fraud in its tenth claim and therein realleged the detailed conspiracy allegations contained in the RICO claim. Plaintiffs contended that Livesey, Dolan and Howard (over whom jurisdiction is appropriate) were agents of the enterprise, and,accordingly, agents of the fraud conspiracy. Plaintiffs argued in the district and appellate court that

while the conpspiracy and enterprise participants consist of many other Canadian persons, that due to the various contracts and depository relationships with Bennett of First Heritage, it is appropriate to find and exercise jurisdiction over First Heritage and Bennett, but not over several other Canadians who participated. This is a logical, fair and constitutionally cognizable cut-off point as to how far a conspiracy theory of personal jurisdiction should be permitted to expand consistant with due process. To hold that First Heritage and Bennett are not subject to jurisdiction because they "weren't parties to agreements" disregards the record to the expense of the jurisdictional issue. The written contracts and depository relationships create the outer boundaries of an agency/conspiracy theory of personal

jurisdiction.

3.) The requirement of a defendant's "purposeful availment of the benefits and protections of the laws of the forum state", Burger King v Rudzewicz, 471 U.S. 462,475 (1985) can also be satisfied by the activities of plaintiff within the state, if the activities are subsequently ratified by the defendant and do,in fact,benefit the enterprise and conspiracy to which defendants are alleged to belong. Plaintiffs argued that the provision of local credit in October of 1989 in the Second Joint Venture Agreement (i.e. loan guarantees made by plaintiff at plaintiff's specifically designated bank(s), which loan guarantee agreements were subsequently authorized or ratified by Bennett in the written mineral lease trust agreement between Dolan, Livesey, plaintiff and Bennett in November of 1989

and which agreements created the funds which were deposited into First Heritage) was defendants' purposeful availment of the benefits and protections of Wisconsin banking facilities and laws. Availability and provision of credit in this world,(in this case from specifically designated Wisconsin banks) was of unquestionable importance to the RICO enterprise and state law conspiracy of which defendants are alleged to be participants. The borrowed funds in October, 1989 (before Bennett's authorization or ratification) and those in November of 1989 (after Bennett's authorization or ratification) were deposited into First Heritage. Bennett signed written trust agreements approving or ratifying borrowings which was undoubtedly the quid pro quo for provision of credit from Plaintiff's Wisconsin bank(s). Wis. Stats.

801.05(5)(b) specifically provides for jurisdiction when services (provision of loan guarantees and credit to the enterprise and conspiracy) are performed by the plaintiff within the state if the performance is authorized or ratified by defendant:

> "801.05. A Court...has jurisdiction over a person served...(5) LOCAL SERVICES, GOODS OR CONTRACTS. In any action which...arises out of...services actually performed for the defendant by the plaintiff within this state if such performance within this state was authorized or ratified by the defendant."

Not only does this statute apply to the facts of this case, but under U.S. Const. amend V and XIV and Shaffer v Heitner, 433 U.S. 186,204 (1977), exercising specific jurisdiction is not violative of due process, despite language in Burger King, supra, and Hanson v Denckla, 357 U.S. 235,253 (1958) generally excluding activities of the plaintiff for

consideration of the "purposeful availment" by defendant. The Seventh Circuit conclusion conflicts directly with Wis. Stats. 801.05 (5)(b).

Alternatively, since the loan guarantees (service activity) are still in existance and outstanding and were so in November of 1989 at Bennetts' approval or ratification, and in February, 1990 when the mineral leases lapsed while in trust, and in April of 1990 when the disclosures were again not made during the phone call from Bennett to Stauffacher, jurisdiction lies under Wis. Stats. 801.05 (4)(a) and, plaintiff contends, its application and exercise is consistant with due process:

> "(4) LOCAL INJURY, FOREIGN ACT. In any action claiming injury to person or property within this state arising out of an act or omission outside this state by the defendant, provided in addition at the time of the injury ...(a)...service activities were carried on within this state...on behalf of the

defendant..."

4.) In Wisconsin, an "agency" theory of jurisdiction is accepted as law Maney v Ratcliff, 399 F.Supp. 760, 768 E.D.Wis.1975), since great weight is given to the "revision notes" of G.W.Foster, Jr. In Wis. Stats. Ann. V.42, p. 54-82 (West),(formally 30 Wis. Stats. Ann.) Foster, in the notes at 42 Wis. Stats. Ann. p. 62 discussing Wis. Stats. 801.05 (4)(a),refers to the "defendant or his agent" as to the party committing the act or omission, while the statute only says "defendant". Both Dolan and Livesey,when appearing on behalf of the enterprise in Wisconsin, were alleged as agents of Bennett of First Heritage. (The Seventh Circuit only considered Livesey's agency, contending that he was Dolan's lawyer and, therefore, was not Bennett's agent nor the agent of the conspiracy (or

enterprise). (<A, p4 (a)>.) In the second circuit, an agency theory was held to not confer jurisdiction over a co-conspirator absent authority to act in the state by the co-conspirator over whom jurisdiction is sought. Leasco Data Processing Equipment Corp. v Maxwell, 468 F.2d 1326, 1343, (1972); Bertha Bldg. Corp. v National Theaters Corp., 248 F.2d.833, 836 (2d.Cir.(1957), cert. den. 356 U.S. 936 (1958). Other courts have held that the existance of a conspiracy would confer personal jurisdiction, but these were cases where the existence of the conspiracy was not denied. National Van Lines, Inc. v Atlas Van Lines, Inc., 406 F. Supp. 1087, 1089-90 (N.D. Ill. 1975), Mandelkorn v Patrick, 359 F. Supp. 692, 696-97 (D.D.C. 1973). Plaintiffs contend one can "purposefully avail himself" through the consented-to or

ratified acts of co-conspirators who come to do business in the forum state. In Wisconsin Elec. Mfg. Co., Inc. v. Pennant Products, 619 F.2d 676, 677 (1980) two visits by an agent to negotiate a contract in Wisconsin was enough to distinguish that case from Lakeside, infra, and confer jurisdiction. The agency issue has not been resolved by the Supreme Court.

5.) 15 USC 78(a)(a) allows for worldwide service of process while 18 U.S.C. 1965 (b) only allows for nationwide service. Plaintiffs contend that complaint claim #3, being a seperate securities law claim (in addition to it being alleged as a a predicate offense to the First Claim under 18 U.S.C. 1962-64 (RICO)) allows for worldwide service and requires only "minimum contacts" with the United States. Clement v Pehar, 575 F.Supp. 436,438

(N.D.Ga. 1983); Fitzsimmons v. Barton, 589 F.2d.330,333 (7th Cir., 1979),. F.T.C. v Jim Walter Corp.,651 F.Supp. 251, 256 (5th Cir. 1981). Defendants' (Respondents')contacts with plaintiffs and Wisconsin and the admission on the Proft affidavit that some of First Heritage's depositors live in the State of Washington, surely are "minimum contacts" with the United States. International Shoe v. State of Washington, 326 U.S. 310 (1946); Cf, Seventh Circuit at A,p.9 (a). In Omni Capital International, Ltd. v Rudolf Wolff and Co., 484 U.S. 97, 102, n.5 (1987), the Supreme Court indicated that the constitutionality of an "aggregation of national contacts" was an issue which it acknowledged was outstanding but had not the occasion to consider. Accord: Ashai Metal Industry Co. v Superior Court of Cal., 480 U.S.

102,113,n.1 (1987). This approach was used in Duckworth v Medical Electro-Therapeutics Inc., 768 F. Supp. 822,830 (S.D.Ga. 1991) for worldwide service in securities fraud cases.

6.) The consent to jurisdiction clause in the First Joint Venture Agreement read: "any controversey arising out of or relating to this Partnership Agreement shall be settled by the Federal United States District Court of the Western District of Wisconsin." The Seventh Circuit <A, p. 5(a)> concluded that First Heritage and Bennett were not bound because they were "not parties to the agreement." The trust agreement with Bennett, however, referred to and "approved" the holding of the of the title in accordance with the subject joint venture agreements. Carnival Cruise Lines, Inc. v Shute, 111 S. Ct. 1522 (1991) and

Bremen v Zapata Offshore Co., 407 U.S. 1 15 (1972) should be analyzed to resolve whether due process includes combining documents in a business and investment setting which specifically refer to, approve and/or ratify contracts containing such consent to jurisdiction clauses. In Wisconsin, a consent to jurisdiction clause is enough in itself to satisfy the due process requirement of Shaffer v Heitner, supra. Datatronic Rental Corporation v De SOL, Inc., 164 Wis. 2d. 289,293; 474 N.W. 2d 780 (Wis. Ct. App. 1991).

7.) Plaintiffs alleged that Wis. Stats. 801.05(1)(d) also applies in this case. The Seventh Circuit <A, p. 2(a)> automatically classified this as a "presence" argument (i.e., jurisdiction unrelated to the cause of action.) Plaintiffs contend that when one group of

depositors (plaintiffs) is "heavy" enough to be "substantial and not isolated" business for defendants, jurisdiction may lie, especially where the bank from which deposits were obtained from loan guarantees is a specifically designated bank (i.e. not an unidentified bank as in Helecopteros Nacionales de Columbia S.A., v Hall, 466 U.S. 408, 416-17 (1984). Further, Helecopteros was stipulated as soley as "general" jurisdiction case, 466 U.S., at 415, n. 10, and did not consider "what sort of tie between a cause of action and a defendants contacts with a forum is necessary to a determination" of personal jurisdiction, i.e. whether there should be a bright line between "general" and "specific". Plaintiffs contend that there is not always a bright line and that the closer the contacts are with the cause of action, the greater the justification

for finding and exercising jurisdiction. Helecopteros, 466 U.S., at 420 (Brennan, J. dissenting), especially where defendants have taken economic benefit from the transaction. Id, at 423.

8.) It is still unclear whether two trust contracts and two depository relationships can create the "continuing obligations" for defendants to have "purposefully availed themselves" under Burger King, 471 U.S., at 475; Travelers Health Assn. v Virginia, 339 U.S. 643, 648. (1950); McGee v International Life Insurance Co., 355 U.S. 220 (1957); Catalano v Lease and Rental Mgt., 600 A.2d 184, 187-88 (N.J. Super. L. 1991). Cf. Lakeside, supra. The Seventh Circuit also seems to be unconcerned about the number of contracts with the forum state plaintiffs ("actually contracts but we can ignore that detail" <A, 2(a)>. There are enough

constitutionally cognizable contacts to find jurisdiction over Respondents.

CONCLUSION:

For the various reasons above, this petition for certiorari should be granted. If some of the Questions Presented are deemed more properly determined by the district court (i.e. Questions #3, 4 and 5) remand to the district court is requested as appropriate.

Respectfully submitted,

October 22, 1992

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APPENDIX (Opinion and Judgment of the Seventh Circuit Court of Appeals in #91-3023 <1(a)-10(a)>, and Memorandum Decision of District Court in #90-C-771S <11(a)-32 (a)>; and, Text of Certain Statutes <33(a)>

In the

United States Court of Appeals

For the Seventh Circuit

No. 91-3023

DAVID G. STAUFFACHER and
JOHN P. STAUFFACHER,

Plaintiffs-Appellants,

v.

JOHN A. BENNETT and
FIRST HERITAGE SAVINGS CREDIT UNION,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 90 C 771—John C. Shabaz, *Judge.*

ARGUED APRIL 15, 1992—DECIDED JULY 28, 1992

Before CUMMINGS and POSNER, *Circuit Judges*, and WILL, *Senior District Judge.**

POSNER, *Circuit Judge.* David and John Stauffacher, residents of Wisconsin who invested millions of dollars in a Canadian gold-mining venture that went sour, brought suit against the venturer, Donald Dolan, and others, in a federal district court in Wisconsin. The Stauffachers now appeal from the dismissal, for want of personal jurisdic-

* Hon. Hubert L. Will of the Northern District of Illinois, sitting by designation.

tion, of their suit against the only defendants remaining in the case, First Heritage Savings Credit Union and John Bennett, an employee of the credit union. Both the credit union and Bennett, like Dolan, are Canadian residents.

The parties to the investment contract (actually contracts, but we can ignore that detail) were the Stauffachers and Dolan. Apparently the contract was negotiated in Canada while the Stauffachers were visiting there, though like much else in the case this is uncertain. They signed the contract in Wisconsin, and through their Wisconsin bank deposited the money for the investment in First Heritage in Canada. The only defendants who visited Wisconsin during the relevant period were Dolan and Donald Livesey, a lawyer who the plaintiffs claim assisted Dolan in promoting the venture. Although Bennett may have mailed some documents to the Stauffachers in Wisconsin and did make a phone call or two to them there, neither call (if there were two) was an attempt to solicit the Stauffachers' deposit. The suit charges mainly fraud and other violations of Wisconsin state law, but is garnished with RICO and federal securities claims. After Bennett and First Heritage were dismissed, the plaintiffs obtained a default judgment against Dolan and settled with the remaining defendants, producing the final judgment from which the plaintiffs appeal.

The only issue concerning the common law and RICO claims is whether Bennett and First Heritage come within Wisconsin's long-arm statute. As is generally the case with such statutes, *Wilson v. Humphrey's (Cayman) Ltd.*, 916 F.2d 1239, 1244 (7th Cir. 1990); *Saylor v. Dyniewski*, 836 F.2d 341, 342 (7th Cir. 1988), jurisdiction over a nonresident can be based either on his having a substantial, continuing "presence" in the state or on his performing there some acts related to the injury of which the plaintiff complains even if the acts don't add up to a solid presence. The first head of jurisdiction requires "substantial and not isolated activities within this state," Wis. Stat. § 801.05(1)(d), and is plainly not satisfied here and could not be, consistent with the due process clause. *Helicopteros Nacionales*

de Colombia, S.A. v. Hall, 466 U.S. 408 (1984). First Heritage (for the most part we shall not need to discuss Bennett, its employee, separately) did not solicit, create, nurture, or maintain, whether through personal contacts or long-distance communications, a continuing business relationship with anyone in the state. Had there been such a relationship, then even if no employee or other agent of the credit union had ever set foot in Wisconsin the credit union would have established a sufficient "presence" there to warrant an inference (tenuous as it might seem to be) that First Heritage was benefiting from services provided by the state and could therefore be required, as a quid pro quo, to submit to the jurisdiction of the state's courts. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985); *Heritage House Restaurants, Inc. v. Continental Funding Group, Inc.*, 906 F.2d 276, 281-82 (7th Cir. 1990). All the credit union actually did, however, apart from occasional, unspecified, and seemingly trivial communications by Bennett, was to receive a deposit from a Wisconsinite. This created a contract, but a contract isn't a "thick" enough relationship to establish presence. *Burger King Corp. v. Rudzewicz, supra*, 471 U.S. at 478; *Afram Export Corp. v. Metallurgiki Halyps, S.A.*, 772 F.2d 1358, 1362-63 (7th Cir. 1985); *Sher v. Johnson*, 911 F.2d 1357, 1362 (9th Cir. 1990). We would not expect anyone to argue that if the First National Bank of Chicago accepts a deposit from a man in Saudi Arabia, this thrusts the bank into the banking business in Saudi Arabia, thus exposing it to suit there by *any* resident of the kingdom for *anything* at all, whether or not the plaintiff is the depositor or his claim is related to the deposit. The bank's presence in Saudi Arabia would be so tenuous as to cross the line from permissible to impermissible legal fiction, generously as that line has been drawn in favor of extraterritorial jurisdiction. Yet that is the character of the plaintiffs' argument.

If a Wisconsinite claims to have been injured within the state by an act committed outside, the Wisconsin courts have jurisdiction over a claim arising from the injury (not

just any claim, as when personal jurisdiction is based on "presence") despite the defendant's lack of a palpable presence. But only, so far as bears on this case, if "solicitation or service activities were carried on within this state by or on behalf of the defendant." Wis. Stat. § 801.05(4)(a). First Heritage carried on neither type of activity in Wisconsin. Bennett's one or two calls, and his mailing of some documents, were not solicitations; whether they could be construed as service activities is impossible to glean from this record. There are other provisions of the long-arm statute but none remotely applicable.

The Stauffachers emphasize all the things *they* did in Wisconsin in connection with the gold-mining venture. But a plaintiff cannot obtain jurisdiction over a nonresident defendant by bustling about in his own state, however energetically. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958); *Coté v. Wadel*, 796 F.2d 981, 984 (7th Cir. 1986). They also warn us that in the age of the facsimile machine an emphasis on personal presence in the plaintiff's state is outmoded. It is they who are outmoded. Rather than utilize the facilities of the electronic age that they desire us to celebrate, apparently the Stauffachers trotted off to British Columbia to negotiate the contract in person, then came home and signed and (so far as appears) mailed it.

All this leaves out of account, however, the possibility that Livesey might be deemed an agent of First Heritage; and we may assume without having to decide that his two visits to Wisconsin on promotional missions related to the gold-mining venture were enough to satisfy the requirement of "solicitation" in the subsection just quoted. The problem is that although the plaintiffs continue to argue that Livesey was First Heritage's agent, he was not. He was Dolan's agent. His activities may have sufficed to make Dolan suable in Wisconsin—though the question is academic, since Dolan brought himself directly within that jurisdiction by his visits—but Dolan is not First Heritage.

For the same reason the Stauffachers cannot prevail by reference to the forum-selection clause in the investment

contract. It is true that the provision is broadly worded: "any controversy or claim arising out of or relating to this Partnership Agreement shall be settled by the Federal United States District Court of the Western District of Wisconsin." And such clauses are enforceable. *Carnival Cruise Lines, Inc. v. Shute*, 111 S. Ct. 1522 (1991); *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972); *Northwestern National Ins. Co. v. Donovan*, 916 F.2d 372, 377 (7th Cir. 1990). But the only remaining defendants, First Heritage and Bennett, are not parties to the agreement.

We can imagine an argument that Livesey was a member of the conspiracy to defraud the Stauffachers and First Heritage another member of it; and for most purposes the acts of one conspirator within the scope of the conspiracy are attributed to the others. Despite doubt expressed in Ann Althouse, "The Use of Conspiracy Theory to Establish In Personam Jurisdiction: A Due Process Analysis," 52 *Fordham L. Rev.* 234, 251-54 (1983), that the due process clause permits a state to assert extraterritorial jurisdiction over a person who did not foresee that the conspiracy which he joined would commit acts within that state, we have difficulty understanding why personal jurisdiction should be an exception. If through one of its members a conspiracy inflicts an actionable wrong in one jurisdiction, the other members should not be allowed to escape being sued there by hiding in another jurisdiction. The analogy to agency is even more direct here, because the complaint alleges that Dolan and First Heritage were leagued in a RICO enterprise, and if Livesey was the agent of the enterprise, what more should be necessary to bring the enterprise, and hence First Heritage, a principal in it, within the long arm of the long-arm statute?

The problem with this approach, a problem recognized but not yet definitively resolved by the cases, is that it merges the jurisdictional issue with the merits. Whether there was a conspiracy here, or a RICO enterprise, or

some other nefarious linkage among Dolan, First Heritage, and Livesey, is at the heart of the case on the merits. It would be more than awkward to postpone the jurisdictional issue to the merits; it would dissolve the issue. If the plaintiff won on the merits, the jurisdictional issue would be automatically resolved in his favor, while if he lost the defendant would waive personal jurisdiction and take the judgment for its preclusive value in subsequent suits. But to resolve the jurisdictional issue in advance would require the district court to conduct an evidentiary hearing as extensive as, and in fact duplicative of, the trial on the merits—either that or permit a nonresident to be dragged into court on mere allegations.

Parallel problems arise with other threshold issues, notably public-officer immunity in search and seizure cases, which often present factual questions similar or even identical to those presented by the plaintiff's substantive claim, such as probable cause. *Elliott v. Thomas*, 937 F.2d 338 (7th Cir. 1991); *Llaguno v. Mingey*, 763 F.2d 1560, 1569 (7th Cir. 1985) (en banc) (plurality opinion). Or consider the use of conspiracy theory to bring testimony within the coconspirator exception to the hearsay rule (Fed. R. Evid. 801(d)(2)(E)) before the prosecution has proved the existence of the conspiracy to the jury's satisfaction. *Bourjailly v. United States*, 483 U.S. 171, 175, 179-80 (1987); *Martinez v. McCaughtry*, 951 F.2d 130, 135 (7th Cir. 1991). The judge must determine the existence of a conspiracy by a preponderance of the evidence before he may allow the jury to consider the coconspirator's statement as evidence bearing upon the defendant's guilt. *United States v. Martinez de Ortiz*, 907 F.2d 629, 631-32 (7th Cir. 1990) (en banc).

Another, and it might seem conclusive, parallel to our case is that when allegations of subject-matter jurisdiction are questioned by the defendant the judge must satisfy himself, if necessary by conducting an evidentiary hearing, that he has jurisdiction before he can proceed to the merits. *Kanzelberger v. Kanzelberger*, 782 F.2d 774, 777 (7th

Cir. 1986); *Metropolitan Life Ins. Co. v. Estate of Cammon*, 929 F.2d 1220, 1222-23 (7th Cir. 1991). But that situation is different from ours in two respects. A judge has no power to decide a case over which he lacks subject-matter jurisdiction, whereas he can decide a case though he lacks personal jurisdiction over the defendant, if the defendant waives the issue of personal jurisdiction. More important, the issue of subject-matter jurisdiction will rarely be the same issue as the issue on the merits, so there is no duplication of judicial effort in resolving the former by a pretrial evidentiary hearing.

The cases are unanimous that a bare allegation of a conspiracy between the defendant and a person within the personal jurisdiction of the court is not enough. Otherwise plaintiffs could drag defendants to remote forums for protracted proceedings even though there were grave reasons for questioning whether the defendant was actually suable in those forums. A defendant could always refuse to appear, and take his chances, but then it would be easy for the plaintiff, lacking an opponent, to "prove" that there really had been a conspiracy and so obtain a default judgment that the defendant could not upset. The cases diverge, however, on how much more than a nakedly conclusory allegation of conspiracy is required. Some cases insist, much as where the prosecution wants to place a coconspirator's statement in evidence, that the plaintiff seeking to obtain personal jurisdiction on a theory of conspiracy present sufficient evidence, whether by affidavit or otherwise, to enable the judge to make a reliable, albeit not definitive, determination, in advance of pretrial discovery and trial, that there really was a conspiracy. Other cases seem content with a minimal factual showing, or even just with specific allegations, of conspiracy. The diversity of approaches is illustrated by *Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229, 1236-37 (6th Cir. 1981); *Chandler v. Barclays Bank PLC*, 898 F.2d 1148, 1155 n. 3 (6th Cir. 1990); *Ecclesiastical Order of the Ism of Am, Inc. v. Chasin*, 845 F.2d 113, 116 (6th Cir. 1988) (per

curiam); *Edmond v. United Postal Service General Counsel*, 949 F.2d 415, 424-27 (D.C. Cir. 1991); *First Chicago International v. United Exchange Co.*, 836 F.2d 1375, 1377-79 (D.C. Cir. 1988), and *Naartex Consulting Corp. v. Watt*, 722 F.2d 779, 787-88 (D.C. Cir. 1983). For reasons explained below, we shall not have to choose in this case among the competing approaches.

Whether personal jurisdiction can be obtained under a state long-arm statute on a conspiracy rationale at all is a question of state law. *Davis v. A & J Electronics*, 792 F.2d 74, 76 (7th Cir. 1986); *Textor v. Board of Regents*, 711 F.2d 1387, 1392-93 (7th Cir. 1983). We have no idea whether the Wisconsin courts would adopt the rationale, but we needn't make a stab in the dark on the question, for the plaintiffs have made no attempt to show that there was a conspiracy. The problem goes deeper than a failure to make a preliminary evidentiary showing. While alleging a broad conspiracy, the Stauffachers have never claimed that Livesey was an agent *of the conspiracy*. They came closest in the complaint, when they said that the defendants, including Livesey, "aided and abetted, conspired, and perpetrated the myth of Don Dolan as being 'legitimate.' " But if this is a hint at a conspiracy rationale for personal jurisdiction at all, it is an obscure one. In their briefs both in the district court and in this court, the Stauffachers say that Livesay was Dolan's agent, which is true but irrelevant, and that he was First Heritage's agent, which without any elaboration (and they offer none) is false. They shy from taking the final step, which would be to claim that Livesey was an agent of the conspiracy (or the RICO enterprise) itself. When one of the judges suggested this theory to the plaintiffs' counsel at argument he naturally embraced it with alacrity and even asked for permission to file a supplementary brief elaborating it. But the time for that was in the district court, and had passed.

Thus far we have been discussing jurisdiction under Wisconsin's long-arm statute. That is all the plaintiffs have to work with so far as their claims under state law are

concerned. But they have federal claims as well, so we must consider the jurisdictional provisions of the relevant federal statutes. The RICO statute authorizes nationwide service of process, 18 U.S.C. § 1965(b); *Lisak v. Mercantile Bancorp, Inc.*, 834 F.2d 668, 671-73 (7th Cir. 1987), but not *international* service. For that the RICO plaintiff must rely on the long-arm statute of the state in which he files his suit. *Brink's Mat Ltd. v. Diamond*, 906 F.2d 1519, 1521-23 (11th Cir. 1990), so the analysis is as above.

The service of process provision of the Securities Exchange Act, 15 U.S.C. § 78aa, however, authorizing as it does service on a defendant "wherever [he] may be found," has been interpreted to allow service abroad. *SEC v. International Swiss Investments Corp.*, 895 F.2d 1272, 1275 (9th Cir. 1990). But this is provided that the defendants have the same contacts with the United States as they would have to have with Wisconsin in order to be suable in a court of that state under the "presence" theory of extraterritorial jurisdiction. *United Rope Distributors, Inc. v. Seatriumph Marine Corp.*, 930 F.2d 532, 534 (7th Cir. 1991); *Max Daetwyler Corp. v. R. Meyer*, 762 F.2d 290, 294 n. 3 (3d Cir. 1985); *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 418 (9th Cir. 1977); *Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d 1326, 1340 (2d Cir. 1972) (Friendly, C.J.); Graham C. Lilly, "Jurisdiction over Domestic and Alien Defendants," 69 *Va. L. Rev.* 85, 132 (1983). Recall that extraterritorial jurisdiction on the basis of a defendant's activities within the jurisdiction is a quid for a quo that consists of being given the protection of local, in this case U.S., law. The quo is missing here. First Heritage obtains no significant benefit from the laws of the United States, because it conducts no significant business within the territorial domain of those laws. Besides its trivial connection with Wisconsin, its only other contact with the United States is that a few of its depositors live across the national boundary from it, in the State of Washington. The totality of First Heritage's U.S. contacts is too sparse to bring it within the grasp of the U.S. courts.

The suit was properly dismissed.

AFFIRMED.

A true Copy:
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Clerk of the United States Court of Appeals for the Seventh Circuit

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IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

DAVID G. STAUFFACHER and
JOHN P. STAUFFACHER,

Plaintiffs,

MEMORANDUM AND ORDER

v.

90-C-771-S

DONALD J. DOLAN, DOUGLAS J. LIVESEY,
JOHN ALEXANDER BENNETT, FIRST
HERITAGE SAVINGS CREDIT UNION, AND
JAMES M. HOWARD,

Defendants.

Defendant First Heritage Savings Credit Union brings this motion to dismiss for lack of personal jurisdiction pursuant to Rule 12 (b) (2) , Federal Rules of Civil

Procedure. This Court has subject matter jurisdiction based upon 28 U.S.C. 1331. Defendant's motion to dismiss for lack of personal jurisdiction is granted.

INTRODUCTION

Jurisdiction over the person is asserted in accordance with the Wisconsin long-arm statute, Wisconsin Statute 801.05. This statute is applicable pursuant to Rule 4 (e) , Federal Rules of Civil Procedure. It is proper to determine an issue of personal jurisdiction by examining documents and affidavits. The party asserting personal jurisdiction has the burden of proof, which in this case are the plaintiffs David G. Stauffacher and John Stauffacher. Because the motion will be decided on the basis of written materials, plaintiffs need only show a

prima facie case of jurisdiction. In addition, plaintiffs are entitled to the resolution of disputed relevant facts in their favor. See Wisconsin Electric Manufacturing Co, Inc. v. Pennant Products. Inc.. 619 F. 2d 676, 677 n. 1 (7th Cir. 1980) and Neiman v. Rudolf Wolff & Co. Ltd., 619 F.2d 1189, 1190 (7th Cir. 1980).

BACKGROUND FACTS

Plaintiffs David G. Stauffacher (D. Stauffacher) and John P. Stauffacher (J. Stauffacher) are residents of the State of Wisconsin.

Defendant Donald J. Dolan (Dolan) is a miner, mining business operator and an investment capital procurer who is a resident of Hope, British Columbia,

Canada.

Defendant John Alexander Bennett (Bennett) is a resident of Hope, British Columbia, Canada and is a trust company manager and bank trust officer at First Heritage Savings Credit Union Hope (First Heritage). First Heritage is a credit union located in Hope, British Columbia, Canada.

Plaintiffs and Dolan entered into various agreements whereby plaintiffs invested over $3,000,000 in two separate gold mining joint venture investments. The purpose of the joint venture investments was for defendant Dolan to operate profitable 40 acre and 100 acre placer gold mining operations on two separate mineral leases in Canada. Consequently, a substantial profit would be generated and

a percentage of the profits were to be paid plaintiffs.

As security for the repayment of the initial monetary investment plaintiffs and Dolan entered into a trust/escrow agreement. Pursuant to the terms of the agreement Dolan was the borrower, D. Stauffacher the beneficiary and Bennett the trustee. Bennett also maintained title to the mining leases. For purposes of this motion the parties have agreed that Bennett was acting in his capacity as agent of the First Heritage Credit Union when he assumed the role of trustee.

Subsequently, plaintiffs' investment in the mineral leases was lost and plaintiffs contend that the loss was the result of various misrepresentations and breaches by the defendants, including Bennett and

First Heritage.

JURISDICTIONAL FACTS

Due to the nature of the claims it is necessary to set forth those facts which relate to the issue of this Court's personal jurisdiction over First Heritage. Because First Heritage has conceded that Bennett is its agent for purposes of this motion, the appropriate jurisdictional analysis requires the Court to examine Bennett's contacts with the State of Wisconsin as well as those of First Heritage generally. All inferences and disputed facts have been resolved in favor of the plaintiffs in accordance with Pennant.

It is undisputed that First Heritage has no offices or employees in Wisconsin. It

is also undisputed that Bennett has never been in the State of Wisconsin. The transaction giving rise to the dispute involves investments in mining ventures in Canada. The situs of the property that is the subject of the dispute is in Canada. Bennett's role in the venture was as trustee. His duties as trustee were to be performed in Canada. [Plaintiffs' contention that the trustee was to open an escrow account in Sun Prairie, Wisconsin is without merit. The document provides that David Stauffacher is to open an escrow account in Sun Prairie for the purpose of depositing cash receipts paid by Dolan from the joint venture.] The trust/escrow agreement and a subsequent document entitled the Lease Record Title Transfer were executed by Bennett in Canada, although D. Stauffacher did execute his portion of the lease title

transfer document in Madison, Wisconsin.

D. Stauffacher deposited large sums of money pursuant to the investment arrangements into First Heritage. Plaintiffs also had a business account at First Heritage unrelated to the escrow/trust agreement. Bennett placed one phone call to the plaintiff, D. Stauffacher. (There is some indication that Bennett may have placed two calls but the substance of only one call is known.) The substance of the call was Bennett's request that he be allowed to withdraw from the trust arrangement. Bennett mailed or caused to be sent various documents to the plaintiffs.

MEMORANDUM

In order to examine the issue of personal

jurisdiction "a court must consider whether a defendant is subject to jurisdiction under an applicable state long-arm statute. Second, a court must determine whether an exercise of jurisdiction would comport with the due process requirement of the Fourteenth Amendment." Watson v. Watson, (N.D. Ill. E.D. April 7, 1987) (LEXIS, Genfed Lib., 7th Cir. File) , citing Giotis v. Apollo of the Ozarks, Inc., 800 F.2d 660, 665 (7th Cir. 1986). "In the instant case however it is not necessary to linger over the construction of the Wisconsin long-arm statute because it was intended to be coextensive with due process. The Court can consider briefly whether the statute is met and then proceed directly to the due process analysis." Watson citing Giotis at 666.

Here, the plaintiffs invoke numerous provisions of the Wisconsin long-arm statute to demonstrate the appropriateness of personal jurisdiction. The contacts which Bennett and First Heritage had with the State of Wisconsin do not comport with due process. Because the tenants of due process have not been met there is no need to linger over the Wisconsin long-arm provisions. However, after a court examines due process generally, it addresses various provisions of the long-arm statute to further demonstrate whether the type of contacts necessary for personal jurisdiction are present.

In order to adequately examine the due process considerations various guiding principles must be pursued. First, "a court must consider whether the defendant purposefully established 'minimum contacts

' in the forum state." Burger King Corp. (v.) Rudzewicz, 471 U.S. 462 (1985). Second, "the court must determine whether the defendant's conduct and connection with the forum state are such that he would reasonably anticipate being haled into court there." World Wide Volkswagen v. Woodson, 444 U.S. 286, 295 (1980). Finally, "jurisdiction will exist where the defendant has by some act purposefully availed himself of the privilege of conducting activities within the forum state" 235, 253 (1957).

The last principle provides the most guidance in the present action. Plaintiffs, not defendant, engaged in various activities within the State of Wisconsin, including borrowing significant sums of money from Wisconsin banks. Plaintiffs, pursuant to the partnership

and escrow/trust agreement sent these sums of money to Canada. Defendants Bennett and First Heritage also acted according to the agreements and performed the various trust activities in Canada. There is absolutely no indication that Bennett or First Heritage availed themselves of any privileges associated with conducting activities within the State of Wisconsin. Other than some phone and mail contact, Bennett had no contacts with Wisconsin. Bennett, as trustee, was not required to perform any activities within Wisconsin. It must be further noted that none of the agreements contained a requirement that the plaintiffs borrow money from Wisconsin banks. Plaintiffs could have chosen to borrow money to finance the investment from any source. It appears that plaintiffs are attempting to establish personal jurisdiction over defendants

Bennett and First Heritage by examining their own actions. Specifically, borrowing money and depositing this money into First Heritage as contemplated by the agreements. It is a well-established rule that "unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state." Hanson at 253. In examining the contacts that defendant had with Wisconsin, such contacts, mail and phone, are virtually non existent. Phone contact was not instrumental in negotiating the agreements. Plaintiffs, on the other hand, deposited money into the Canadian institution and, in fact, established another business account with it. There is absolutely no indication that Bennett or First Heritage solicited the business account. The Court cannot find any act by

which Bennett/First Heritage purposefully availed themselves of the laws and protection of Wisconsin.

Plaintiffs attempt to argue that because Bennett failed to disclose some material information and because Dolan appeared more credible with the backing of First Heritage, plaintiffs were persuaded to invest in the mines. While it may be true that Bennett failed to disclose pertinent information, his alleged liability does not provide for the minimum contacts necessary to establish personal jurisdiction. The Court agrees with defendants' argument that the only connection to Wisconsin is the fact that plaintiffs reside in Wisconsin. The residence of the plaintiffs without other contacts is not sufficient to confer jurisdiction. Cote v. Wadel, 796 F.2d 981

(7th Cir. 1986) .

Plaintiffs' other argment the which attempt to establish requisite contacts with the forum are without merit. Specifically, plaintiffs argue that a choice of law clause in the partnership agreement governs personal jurisdiction. Also, the fact that plaintiffs executed some of the documents in Wisconsin and were present in Wisconsin when some of the negotiations took place evidence personal jurisdiction. Again, the plaintiffs' contacts with the forum state are not relevant in the determination of personal jurisdiction over the defendant. Formalities of contract execution are also not determinative for purposes of personal jurisdiction. Lakeside Bridge & Steel v. Mountain State Const., 597 F.2d 596, 604 (7th Cir. 1979) .

Concerning the choice of law provision found in the first investment contract the Court is of the opinion that Bennett and First Heritage are not bound by that provision because they were not parties to that agreement and accordingly could not have "availed themselves of the law of the forum." In addition, upon its complete reading of the agreement the Court finds a number of provisions which require the application of Canadian law to the conflict and is not convinced that the choice of law provision which provides for claims resolution in Wisconsin is controlling. Finally, a choice of law provision absent other contacts is not determinative of personal jurisdiction. "[T]he concept of choiceof-law is distinct from consent to personal jurisdiction." Torco Oil Co. v. innovative Thermal Corp.,

730 F. Supp. 126, 132 (N.D. Ill. 1989) .

The fact that defendant Bennett's contacts with the state do not comport with due process are further illustrated by the fact that the defendant's activities do not meet the requirement of any Wisconsin provision of the long-arm statute.

Wisconsin Statutes 801.05(1) (d) requires the defendant to perform "substantial activities" within the state. As set forth above the defendant did not engage in any substantial activities within the state. Defendant's activities in performing his duties as trustee occurred in Canada. Plaintiff's rely on the fact that because D. Stauffacher deposited large sums of money into First Heritage, First Heritage activities within the state were substantial. Plaintiffs contend:

> First Heritage definitely got the benefits of being able to obtain substantial deposits from the forum district plaintiffs and banks. Therefore, they afforded themselves of the benefits and protection of Wisconsin law and purposefully availed themselves of the privilege of conducting activities within the forum state and personal jurisdiction should lie.

See Plaintiffs' Brief in Opposition to Dismissal at page 25. Plaintiffs make an unsubstantiated leap in logic. The fact that plaintiffs deposited money into the Canadian bank does not give rise to a purposeful availment by the bank of the laws and protection of Wisconsin. Even if the Court takes into consideration the subsequent account opened by the plaintiffs at First Heritage, it cannot determine that this qualifies as substantial activities within the State of Wisconsin. Wisconsin Statute 801.05(4)(a) is the focal point of Plaintiffs'

argument for personal jurisdiction. This provision provides:

> LOCAL INJURY; FOREIGN ACT. In any action claiming injury to person or property within this state arising out of an act or omission outside this state by the defendant, provided in addition that at the time of the injury, either:-
>
> (a) Solicitation or services activities were Carried on within this state bv or on behalf of the defendant

Plaintiff's assert that Bennett had a duty to disclose various information in his fiduciary relationship as trustee. while these omissions may fulfill the first requirement of this statute, there is absolutely no indication that Bennett or First Heritage solicited the plaintiffs in any way. Omissions without other significant contacts do not afford sufficient minimum contacts offend the Court's notion of "fair play and substantial justice." Plaintiffs' other

arguments concerning various provisions of the long-arm statute can be readily resolved on the record. Neither Bennett nor First Heritage serviced the plaintiffs in State of Wisconsin. Any currency conversions would have taken place in Canada. The trust arrangement did not require Bennett or First Heritage to perform any activities in Wisconsin. While Dolan or another defendant may have requested the deposits from the plaintiffs, there is no indication that Bennett or First Heritage directed or ordered the plaintiffs to deposit money into First Heritage. Plaintiff's never received a "document of title or other thing of value" in this State by defendant.

Examining all the contacts that Bennett/First Heritage had with the State

of Wisconsin it is evidence that such contacts do not support due process. Plaintiffs' unilateral activities do not warrant a finding of personal jurisdiction over a nonresident defendant who had minimal phone and mail contact with the plaintiffs in this State while performing duties as trustee of an escrow/trust agreement entered into in Canada. The defendants were not required to perform any services in Wisconsin, nor did Bennett or First Heritage solicit any of the plaintiffs' actions. The defendants did not visit Wisconsin. Finally, defendant Bennett was performing duties as a trustee over property located in Canada pursuant to various agreements entered into in Canada. Accordingly, this Court does not have personal jurisdiction over First Heritage Savings Credit Union.

ORDER

IT IS ORDERED the motion of defendant First Heritage to dismiss for lack of personal jurisdiction is GRANTED. Entered this 19th day of April, 1991.

BY THE COURT:

_____

John C. Shabaz

District Judge

Text of Certain Statutes,
15 U.S.C. 78(a)(a):

"78aa. Jurisdiction of offenses and suits

"The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter of the rules and regulations thereunder and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found.

15 U.S.C. 78(c)(a)(10):

"...The term "security" means any ... certificate of interest or participation in any ... mineral ... lease, any collateral trust-certificate, ... investment contract ..."

18 U.S.C. 1965(b):

"(b) In any action under section 1964 of

this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshall thereof."

Fed R. Civ. Pr. 4(e):

"... (e) Summons: Service Upon Party Not Inhabitant of or Found Within State. Whenever a statute of the United States or any order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule ..."

Fed R. Civ. Pr. 4(f):

"... (f) Territorial Limits of Effective Service. All process other than a subpoena may be served anywhere within the territorial limits of that state in which te district court is held, and, when authorized by a statute of the United States or by these rules, beyond the territorial limits of that state ..."

Wis. Stats. 801.05(1)(d):

"(1) Local Presence or Status ..."

"... In any action whether arising within or without this state, against a defendant who when the action is commenced:"

" . . . "

"(d) Is engaged in substantial and not isolated activities within this state, whether such activities are wholly interstate, intrastate, or otherwise."

Wis. Stats. 801.05(4)(a):

"(4) Local Injury: Foreign Act."

"... In any action claiming injury to person or property within this state arising out of an act or omission outside this state by the defendant, provided in addition that at the time of the injury, either:

(a) Solicitation or service activities were carried on within this state by or on behalf of the defendant; ..."

Wis. Stats. 801.05(5)(b):

"(5) Local Services, Goods or Contracts. In any action which ..."

"(b) Arises out of services actually performed for the plaintiff by the defendant within this state, or services actually performed for the defendant by the plaintiff within this state if such performance within this state was authorized or ratified by the defendant; ..."

92-712

Supreme Court, U.S.
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No. 92-~~172~~

In The

Supreme Court of the United States

October Term, 1992

DAVID G. STAUFFACHER and JOHN P. STAUFFACHER,

Petitioners,

v.

JOHN A. BENNETT and FIRST HERITAGE SAVINGS CREDIT UNION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Respondents First Heritage Savings Credit Union ("First Heritage") and John Alexander Bennett ("Bennett") object to both the form and substance of the "Questions Presented" in pp. i-vi of the Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit ("Petition") and believe the issue should be stated as follows:

> Did the Seventh Circuit err in concluding that the United States District Court for the Western District of Wisconsin could not exercise personal jurisdiction over First Heritage and Bennett?

PARTIES

Respondents First Heritage and Bennett do not object to the "List of Parties" at p. vii of the Petition.

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JURISDICTIONAL STATEMENT

Respondents First Heritage and Bennett do not object to the jurisdiction of this Court under 28 U.S.C. § 1254(1), but do not accept the characterization of the jurisdiction of the lower courts as set forth at pp. 2-6 of the Petition.

STATUTES INVOLVED

For purposes of responding to the Petition, First Heritage and Bennett do not dispute that the statutes listed at p. 7 of the Petition relate to the arguments set forth in the Petition. First Heritage and Bennett do not, however, concede the applicability of these statutes to the issues properly before this Court or accept the characterizations of those statutes in the Petition.

STATEMENT OF THE CASE

First Heritage and Bennett object to the Statement of the Case at pp. 7-28 of the Petition on grounds that it is not "concise" as required by Sup. Ct. R. 14(g) and contains "facts" that are not supported by the record and which are contrary to the facts found by the courts below. First Heritage and Bennett further object that the Statement of the Case in the Petition contains pages of material that are not relevant to the questions of personal jurisdiction that are at issue. The following is a more concise and accurate statement of the case:

Petitioners David G. Stauffacher and John P. Stauffacher ("Stauffachers") filed an action in the United

States District Court for the Western District of Wisconsin to recover damages allegedly suffered as the result of their investment in two Canadian joint ventures involving gold-mine leases. (Petition at 7-8) Among the defendants named were First Heritage, a Canadian credit union with a branch facility in Hope, British Columbia, Canada and Bennett, the branch manager of First Heritage's Hope branch. (*Id.*) The Stauffachers' investment involved two joint venture agreements with Donald Dolan in which some of the invested money was deposited at First Heritage. (*Id.* at 8-9) As part of a trust arrangement, Bennett agreed to hold title to the gold-mine leases as a trustee. (*Id.* at 15, 24-25)

Neither First Heritage, nor Bennett, conducted any activity within the State of Wisconsin. (*Id.* at 3a-4a, 16a-17a) Bennett made one or two phone calls into Wisconsin to speak with the Stauffachers, but neither call involved solicitation. (*Id.*) Bennett may also have mailed documents to Stauffachers in Wisconsin but no such documents involved solicitation. (*Id.*)

Bennett had no other contacts with Wisconsin or the United States. (*Id.*; *id.* at 9a) First Heritage had no other contact except receipt of deposits from several State of Washington residents, just over the Canadian border. (*Id.* at 9a) The number of depositors and the amount deposited was not set forth in the record. (*Id.*) After considering affidavits and proofs submitted on the issue, the United States District Court for the Western District of Wisconsin dismissed the Stauffachers' action against Bennett and First Heritage because of a lack of personal jurisdiction over them. (*Id.* at 11a-32a) In dismissing this action, the District Court made specific findings of fact, resolving all

inferences and disputes of fact in favor of the Stauffachers, and concluded that it could not exercise personal jurisdiction over these defendants. (*Id.* at 13a-18a) On appeal, the Seventh Circuit affirmed the District Court. (*Id.* at 1a-10a)

The Seventh Circuit first set forth the relevant facts and then discussed whether Wisconsin's long-arm statute would allow personal jurisdiction to be exercised. (*Id.* at 1a-2a) It concluded that the contacts with Wisconsin did not satisfy the requirement of "substantial and not isolated activities within this state" as required by Wis. Stat. § 801.05(1)(d). (Petition at 2a) It then concluded that there had been no solicitation within Wisconsin as required by Wis. Stat. § 801.05(4)(a). (Petition at 4a) Finally, it stated, "there are other provisions of the long-arm statute but none remotely applicable." (*Id.* at 4a)

The Seventh Circuit followed its holding with a rejection of various arguments made by Stauffachers to enhance the extent of First Heritage's and Bennett's contacts with Wisconsin. The court held that a "consent to jurisdiction" clause was inapplicable because First Heritage and Bennett were not parties to the agreement which contained it. (*Id.* at 5a) It also rejected Stauffachers argument that the contacts of certain alleged coconspirators could be attributed to First Heritage and Bennett, noting that no conspiracy had been established and that, if it had, there were no allegations that anyone with contact with Wisconsin was an agent of the conspiracy. (*Id.* at 7a-8a)

Finally, the court concluded that the international service provisions of federal securities law would not

authorize personal jurisdiction because the "totality of First Heritage's U.S. contacts is too scarce to bring it within the grasp of the U.S. courts". (*Id.* at 9a)

SUMMARY OF ARGUMENT

The Petition should be denied because it seeks review of state law issues resolved by the lower courts and because it argues legal issues based on a set of facts not supported by the record or found by the lower courts. Certiorari is not the proper vehicle for review of either state law or factual issues.

INTRODUCTION

Respondents Bennett and First Heritage, by their attorneys Michael, Best & Friedrich by James R. Troupis and Steven P. Means, submit the following arguments and authorities in response to the Petition submitted by Stauffachers.

Before the Seventh Circuit, Stauffachers stated the relevant issue as follows:

> Does the trial court in the Western District of Wisconsin have personal jurisdiction under the factual circumstances of this case, over Canadian Defendants First Heritage Savings Credit Union and John Alexander Bennett?

(Brief of Plaintiffs-Appellants, at 1) In their Petition, this single, straight-forward issue has ballooned to a six page statement of issues with nearly twenty subparts. (Petition

at i-vi) However, distilled to their essence, the multiple issues raised by Stauffachers come down to a garden-variety question of personal jurisdiction over foreign defendants.

As with any jurisdictional issue a two level analysis is required. *Giotis v. Apollo of the Ozarks, Inc.*, 800 F.2d 660, 665 (7th Cir. 1986), *cert. denied*, 479 U.S. 1092 (1987). The first level is whether there is a statutory basis for jurisdiction. Here, Stauffachers have relied on the Wisconsin long-arm statute, Wis. Stat. § 801.05, and Federal Securities law to meet the first test. Assuming one meets the first level requirement, the second level of analysis is a determination whether due process will allow jurisdiction to be exercised in a particular case. Both the District Court and the Seventh Circuit Court of Appeals rejected the Stauffachers' jurisdictional arguments and this Brief in Response to Petition for Writ of Certiorari ("Response") discusses the basis for that conclusion.

DISCUSSION

The Petition is a paradigm of confusion. As a result, in responding to the Petition, First Heritage and Bennett have attempted to identify the issues being raised and respond to them accordingly, following the outline of the Seventh Circuit's opinion.

The organizational confusion arises because Stauffachers do not address the legal issue of personal jurisdiction under the facts as found by both the District Court and Seventh Circuit. Rather, Stauffachers continue

to argue a different version of the facts – a version which has already been rejected by the two courts.

I. THE SEVENTH CIRCUIT DECIDED THE CASE UNDER STATE LAW – NOT DUE PROCESS

Stauffacher's Petition argues this case as if it involved issues of due process. However, the due process issue was not addressed by the Seventh Circuit with respect to the state law claims because no statutory (long-arm) basis for jurisdiction was found. (Petition at 2a) Because both the District and Appellate courts concluded that the Wisconsin long-arm statute did not allow personal jurisdiction, they did not address the due process issues, except by analogy.

The rules of this Court limit certiorari review to cases where there are "special and important reasons therefor." Sup. Ct. R. 10. Here, the issue of the reach of Wisconsin's long-arm statute is a pure question of state law. *See Bishop v. Wood*, 426 U.S. 341, 346 (1976) ("[T]his Court has accepted the interpretation of state law in which the District Court and the Court of Appeals have concurred even if an examination of the state-law issue without such guidance might have justified a different conclusion."). In *Bishop*, this court recognized that when both a United States District Court familiar with a state's laws and a United States Court of Appeals agree on an interpretation of state law, independent examination of the state law issue by the Supreme Court is foreclosed. Because the dismissal below was affirmed on Stauffacher's failure to demonstrate Wisconsin's long-arm jurisdiction, certiorari should be denied.

II. DUE PROCESS WOULD NOT ALLOW THE DISTRICT COURT TO EXERCISE PERSONAL JURISDICTION.

Although the Seventh Circuit, for the most part, steered clear of the due process issue, Stauffachers now make due process a focus of the Petition.

Due process protects a party from being sued in a forum unless the party has sufficient, meaningful "contacts, ties, or relations" with that forum. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 (1985) (citing *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)). A defendant must have certain minimum contacts with the forum such that maintenance of the suit does not offend traditional notions of fair play and substantial justice. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). A defendant's conduct within the forum state should be such that he could reasonably anticipate being hailed into court there. *World-Wide Volkswagon Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

Although the Petition suggests that this long-accepted minimum contacts analysis should be abandoned in favor of an expanded construction of due process (Petition at 29), that suggestion is never followed up and the arguments made, in fact, are based almost exclusively on the continuing viability of the minimum contacts standard. Thus, it is the minimum contacts standard as it has evolved through this Court's precedents that should control the issues in this case.

A. Neither First Heritage Nor Bennett Had Minimum Contacts With Wisconsin Sufficient To Meet Either Constitutional Due Process Or State Law.

The Memorandum and Order of the District Court makes extensive and specific findings of fact based on the written proofs it received on the personal jurisdiction issue. (Petition at 13a-18a) Because the court received proofs, it was not obligated to rely on the allegations of the complaint where those allegations were contradicted. *Turnock v. Cope*, 816 F.2d 332, 333 (7th Cir. 1987). Of course, the "facts" under which the Seventh Circuit decided the jurisdictional issue were the same as found by the District Court, although the Seventh Circuit also responded to some of the additional facts raised by Stauffachers.[1]

The case at bar involves a question of "special" rather than "general" jurisdiction, as the contacts urged by the Petition relate directly to the cause of action. *See Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414 (1984). Therefore, the jurisdictional issue turns

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[1] It does not appear that Stauffachers ever appealed from the District Court's findings of fact. The notice of appeal referenced only the portion of final judgment dismissing First Heritage and Bennett and the Appellant's Brief referred to whether jurisdiction existed "under the factual circumstances of this case." The Statement of Facts in the Appellant's Brief merely repeated the fact arguments made to the District Court without addressing the finding that those arguments were rejected. Moreover, Stauffachers argued that the Seventh Circuit had *de novo* review on appeal – a standard that is not applicable to findings of fact.

on the relationship of defendants Bennett and First Heritage with Wisconsin and the litigation. *Id.* (citing *Shaffer v. Heitner,* 433 U.S. 186 (1977)). In the guiding precedent, *Burger King Corp. v. Rudzewicz,* 471 U.S. 462 (1985), a Florida franchisor sued a Michigan franchisee, in Florida, for breach of the franchise agreement. *Id.* at 464. In upholding the exercise of personal jurisdiction, this Court clarified and restated the guidelines for resolving issues of personal jurisdiction over nonresident defendants:

> [T]he constitutional touchstone remains whether the defendant purposefully established "minimum contacts" in the forum State. *International Shoe Co. v Washington, supra,* at 316, 90 L. Ed. 95, 66 S. Ct. 154, 161 ALR 1057. Although it has been argued that foreseeability of causing injury in another State should be sufficient to establish such contacts there when policy considerations so require, the Court has consistently held that this kind of foreseeability is not a "sufficient benchmark" for exercising personal jurisdiction. *World-Wide Volkswagen Corp. v Woodson,* 444 US, at 295, 62 L. Ed. 2d 490, 100 S. Ct. 559. Instead, "the foreseeability that is critical to due process analysis . . . is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *Id.,* at 297, 62 L. Ed. 2d 490, 100 S Ct 559.

Id. at 474. In so holding, this Court emphasized that it is the defendant's contacts with the forum that are relevant – not the plaintiff's. *Id.* at 474-75.

The facts of this case, as stated by the Seventh Circuit, clearly take it beyond the *Burger King* jurisdictional parameters. The only "contacts" with Wisconsin involved

the mailing of documents and one or two phone calls, none of which involved any solicitation. (Petition at 3a-4a) These "contacts" were characterized by the court as "occasional, unspecified and seemingly trivial." (*Id.* at 3a) The District Court found likewise:

> It is undisputed that First Heritage has no offices or employees in Wisconsin. It is also undisputed that Bennett has never been in the State of Wisconsin. The transaction giving rise to the dispute involves investments in mining ventures in Canada. The situs of the property that is the subject of the dispute is in Canada. Bennett's role in the venture was as trustee. His duties as trustee were to be performed in Canada. . . . The trust/escrow agreement and a subsequent document entitled the Lease Record Title Transfer were executed by Bennett in Canada, although D. Stauffacher did execute his portion of the lease title transfer document in Madison, Wisconsin.
>
> . . . Bennett placed one phone call to the plaintiff, D. Stauffacher. (There is some indication that Bennett may have placed two calls but the substance of only one call is known.) The substance of the call was Bennett's request that he be allowed to withdraw from the trust arrangement. Bennett mailed or caused to be sent various documents to the plaintiffs.

(*Id.* at 16a-18a)

Clearly, Due Process would have compelled both the District Court and the Seventh Circuit to dismiss this case on the facts found. Stauffachers cannot – and don't – dispute this. Their tact is to argue new and different facts

and to argue the legal issue of personal jurisdiction only under their alternate scenario.

B. Stauffachers' Hypothetical Arguments Rely On Unestablished Factual Assertions, And Must Be Rejected As A Basis For Jurisdiction.

The issues argued in the Petition all involve "facts" that fall outside the findings of the two lower courts. Review of these issues by writ of certiorari would be improper because the "facts" argued by Stauffachers are not supported by the record. Rather, they are speculative arguments and characterizations that were not supported by proofs submitted to the District Court and are clearly refuted by the record below.[2]

1. First Heritage and Bennett did not Consent to Jurisdiction.

The Petition argues that the Seventh Circuit should have upheld personal jurisdiction based upon a "consent to jurisdiction" clause in a contract. The Seventh Circuit, however, expressly noted that "First Heritage and Bennett are not parties" to this contract. (Petition at 5a) Stauffachers do not dispute this. Rather, they argue that the consent to jurisdiction clause was later "ratified" or

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[2] In the interest of clarity and brevity, Bennett and First Heritage will only discuss some of the main issues in detail. This should not be construed as a waiver of any other objections to misstatements and misunderstandings in the Petition for Writ of Certiorari.

"approved" by Bennett and First Heritage and that Bennett and First Heritage are therefore bound by it.

This ratification argument is based on a series of written contracts. Stauffachers invested in two separate gold-mine mineral leases with Don Dolan ("Dolan"). There was a separate joint venture agreement for each lease. (Complaint, Exh. 1,3) The first such agreement allegedly contained a consent to jurisdiction clause. (*Id.*, Exh. 1) Bennett and First Heritage were not parties to these agreements. (*Id.*, Exh. 1,3) A separate trust agreement was then entered into in British Columbia between Dolan, Stauffachers and defendant Bennett under which Bennett was to hold title to the first mineral lease as trustee. (*Id.*, Exh. 2) No consent to jurisdiction clause appeared in this first trust agreement. (*Id.*)

The second joint venture agreement was to be supplemented by the terms of the first joint venture agreement and further stated that, at Bennett's election, it could serve as the trust agreement for the second mineral lease. (*Id.*, Exh. 3, ¶ 4D) Instead, Bennett became a party to a "lease record title transfer agreement" (*Id.*, Exh. 4), under which he agreed to hold title to the second mineral lease as Trustee. Again, there was no consent to jurisdiction clause in any of these documents.

Both the District Court and the Seventh Circuit Court of Appeals rejected the notion that these contracts resulted in a waiver of Bennett's and First Heritage's personal jurisdiction defense. The District Court stated:

> Concerning the choice of law provision found in the first investment contract the Court is of the opinion that Bennett and First Heritage are not bound by that provision because they

> were not parties to that agreement and accordingly could not have "availed themselves of the law of the forum."

(Petition at 26a) The Seventh Circuit likewise stated:

> For the same reason the Stauffachers cannot prevail by reference to the forum selection clause in the [first] investment contract. It is true that the provision is broadly worded. . . . And such clauses are enforceable. But the only remaining defendants, First Heritage and Bennett, are not parties to the agreement.

(*Id.* at 4a-5a) (citations omitted). Despite the dual rejection of this bizarre theory, Stauffachers persist in arguing that there was a consent to jurisdiction clause applicable to Bennett and First Heritage.

To reach the legal issue of whether such ratification will create jurisdiction, this Court must first reverse the lower courts' factual conclusion that Bennett and First Heritage did not ratify or approve the consent to jurisdiction clause and then decide if such ratification was sufficient to create jurisdiction under state law (an issue not addressed below). However, this Court has made it clear that a writ of certiorari will not be issued to review factual determinations. *See Branti v. Finkel*, 445 U.S. 507, 512 n. 6 (1980) (absent the most exceptional circumstances, factual determinations in which the District Court and Court of Appeals have concurred will not be reviewed by the Supreme Court). In addition, as noted above, the Court will not accept a certiorari request to rule on state law issues. Finally, even if this Court were inclined to review the factual determinations of the two

lower courts, the documents themselves refute Stauffachers' claim of ratification or approval.

Assuming that ratification of the consent to jurisdiction clause was found, that ratification could carry no more weight than an actual agreement to that effect. In *Burger King*, this court expressly addressed the significance of a similar provision addressing choice of law and concluded that it was only one of many factors to consider in determining the jurisdictional issue. 471 U.S. at 482. Thus, the issue is not one that needs to be addressed by this Court on certiorari.

2. Stauffachers Did Not Establish a Factual Basis For a Conspiracy.

As a backstop argument, the Stauffachers argue that if First Heritage and Bennett do not themselves have sufficient contacts with Wisconsin, the alleged acts of agents and co-conspirators may be attributed to them in order to support the exercise of personal jurisdiction. Stauffachers have even alleged that their own acts can be attributed to First Heritage and Bennett:

> The requirement of a defendant's "purposeful availment of the benefits and protections of the laws of the forum state", *Burger King v. Rudzewicz*, 471 U.S. 462, 475 (1985) can also be satisfied by the activities of *plaintiff* within the state, if the activities are subsequently ratified by the defendant and do, in fact, benefit the enterprise and conspiracy to which defendants are alleged to belong.

(Petition at 35) Again, the Petition is woefully inadequate.

The question of whether an agent's or co-conspirator's acts may be attributed to a defendant for purposes of creating jurisdiction is only relevant if an agency relationship or conspiracy has been established. The Seventh Circuit concluded that, under the law of Wisconsin, Stauffachers have not done this. It stated:

> All of this leaves out of account, however, the possibility that [co-defendant] Livesey might be deemed an agent of First Heritage; and we may assume without having to decide that his two visits to Wisconsin on promotional missions related to the gold mining venture were enough to satisfy the requirement of "solicitation" in the subsection just quoted. The problem is that although the plaintiffs continue to argue that Livesey was First Heritage's agent, he was Dolan's agent. His activities may have sufficed to make Dolan suable in Wisconsin – though the question is academic, since Dolan brought himself directly within that jurisdiction by his visits – but Dolan is not First Heritage.

(Petition at 4a)

In addition to arguing that Livesey was the agent of First Heritage and Bennett, Stauffachers attempted to argue that Livesey was part of a conspiracy or RICO enterprise with Bennett and First Heritage. The Seventh Circuit Court of Appeals refused to consider this issue because it had not been raised in the District Court:

> The problem goes deeper than a failure to make a preliminary evidentiary showing. While alleging a broad conspiracy, the Stauffachers have never claimed that Livesey was an agent of the conspiracy. . . . When one of the judges suggested this theory to the plaintiff's counsel at

> argument he naturally embraced it with alacrity and even asked for permission to file a supplementary brief elaborating it. But the time for that was in the district court, and had passed.

(*Id.* at 8a). As the Seventh Circuit concluded:

> The cases are unanimous that a bare allegation of a conspiracy between the defendant and a person within the personal jurisdiction of the court is not enough.
>
> . . . [T]he plaintiffs have made no attempts to show that there was a conspiracy.

(*Id.* at 7a, 8a)

Moreover, the "split of authority" relied on by Stauffachers involves the question of what is needed to allege a conspiracy in other contexts, such as when a prosecutor attempts to place a co-conspirator's statement into evidence. Even those cases agree that a bare allegation of conspiracy without either some factual support or some detail as to the basis for the allegation of conspiracy is insufficient. *See, e.g., First Chicago Int'l v. United Exchange Co.*, 836 F.2d 1375, 1378 (D.C. Cir. 1988) (bare allegation of conspiracy or agent is insufficient to establish personal jurisdiction); *Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229, 1237 (6th Cir.), *cert denied*, 454 U.S. 893 (1981) ("totally unsupported allegations of conspiracy cannot constitute sufficient contacts . . . to justify an exercise of personal jurisdiction. . . . ").

At some point, this Court may choose to address the issue of what is needed to support a conspiracy allegation for jurisdictional purposes. This case, however, is not the

proper vehicle, as nothing was offered in the courts below to supplement the allegations.[3]

III. FEDERAL SECURITIES LAW DOES NOT PROVIDE A STATUTORY BASIS FOR PERSONAL JURISDICTION.

In addition to alleging that Wisconsin law authorizes personal jurisdiction to be exercised over these defendants, Stauffachers (at least on appeal) have argued that federal racketeering and securities law also provide statutory grounds for the exercise of personal jurisdiction. The Seventh Circuit also rejected these arguments.

A. RICO Jurisdiction is Determined Under State Law Which in Wisconsin Would Not Bring Bennett or First Heritage Within the Court's Jurisdiction.

Although RICO authorizes *nationwide* service of process, it does not authorize service outside of the United States. 18 U.S.C. § 1965(b); *Lisak v. Mercantile Bancorp, Inc.*, 834 F.2d 668, 671-73 (7th Cir. 1987), *cert. denied*, 485 U.S. 1007 (1988). For international service of process, such as that involved in the present case, a RICO plaintiff must rely on a state's long-arm statute. *Brink's Mat Ltd. v. Diamond*, 906 F.2d 1519, 1521-23 (11th Cir. 1990). Because

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[3] Bennett and First Heritage do not concede that Stauffachers sufficiently alleged a conspiracy of RICO enterprise that would include them.

review of the exercise of personal jurisdiction under Wisconsin law has been discussed above, the court is referred to Sections I and II of this brief.

B. Personal Jurisdiction is not Supported by the Federal Securities Law.

On appeal to the Seventh Circuit, Stauffachers attempted to create personal jurisdiction under the Securities Exchange Act, 15 U.S.C. § 78aa. This provision has been interpreted to allow service of process on a defendant outside of the United States, *see, e.g., Securities & Exchange Comm'n v. International Swiss Investments Corp.*, 895 F.2d 1272, 1275 (9th Cir. 1990), but nothing in that statute changes the basic prerequisite of personal jurisdiction.

Though there is great doubt that the Stauffachers had ever properly raised securities law jurisdiction, nonetheless, the Seventh Circuit concluded that, in any event, the exercise of personal jurisdiction would not be proper because of a lack of sufficient contacts with the United States. It stated:

> Besides its trivial connection with Wisconsin, its only other contact with the United States is that a few of its depositors live across the national boundary from it, in the State of Washington. The totality of First Heritage's U.S. contacts is too sparse to bring it within the grasp of the U.S. courts.
>
> The suit was properly dismissed.

(Petition at 9a-10a)

The minimum contacts issue was discussed in Section II above, and need not be repeated here. The only new "contacts" relevant to securities law involve the fact that a few United States depositors have accounts with First Heritage. Neither the number or amount of these accounts was established below, nor is there any record as to other contacts with the United States. With respect to defendant Bennett, there were no additional contacts alleged.

There is no adequate factual basis which supports a further review. The jurisdictional issues were never pleaded or preserved for review. Grant of the Petition would therefore be inappropriate.

CONCLUSION

First Heritage and Bennett respectfully request that the Petition for Writ of Certiorari be denied.

Dated this 23rd day of November, 1992.

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(3)

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No. 92-712

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

DAVID G. STAUFFACHER and
JOHN P. STAUFFACHER,

Petitioners,

v.

JOHN A. BENNETT and
FIRST HERITAGE SAVINGS CREDIT UNION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION FOR WRIT OF CERTIORARI

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December 5, 1992

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REPLY ARGUMENT

(1.) Issues Stated in Compartmentalized Fashion with Only Enough Factual Detail to Identify Controlling Jurisdictional Facts Upon Which the Various Personal Jurisdictional Theories Presented Might be Resolved by the Supreme Court

This is not a simple contract or tort case where the jurisdictional facts would be relatively straight forward. This is a case with complex multiple claims, multiple defendants, and allegations of common law fraud, conspiracy, securities fraud, and a RICO enterprise involving Respondents. Accordingly, the facts Petitioners felt necessary to state in the specific issues for review under SUP. CT. R. 14. 1 (a) are lengthy but arguably appropriate in order to identify and comparmentalize the various jurisdictional theories. Petitioner further does not wish to inadvertantly waive any issues by failing to state them. The "issue" as

presented by Respondent does not particulary encapsule any of the facts for the required particularized assessment of the relationship among the defendants, the forum and the litigation. Shaffer v. Heitner, 433 U.S. 186,204 (1977). To the extent the issue format is too detailed, the Petitioners apologize for their genuine effort to be thorough.

(2.) Respondents' Reliance Upon The Facts "Found" By The District Court and Seventh Circuit is Incorrect

The entire matter of personal jurisdiction is reviewable de novo as a question of law and higher Courts should not be bound by the lower Courts' factual findings. Datatronic Rental Corporation v. De Sol, Inc., 164 Wis. 2d. 289, 292; 474 N.W. 2d. 780, 782 (Wis. Ct. of App., 1991), a fortiori, where factual findings are "clearly erroneous". U.S. v. Hocking 860 F.2d. 769, 772 (7th Cir., 1988) (Branti v.

Finkel, 445 U.S. 502, 526, n. 6 (1980) cited by Respondents did not involve denovo review of a motion to dismiss for want of personal jurisdiction, but involved 8 days of evidentiary hearings in a full Court trial. Id, at 508)

(3.) Contrary to Respondents' Position, Wis. Stats. 801.05 (5)(b) was raised in the District Court and the Seventh Circuit, and its application is factually Supported by the Record. Further, Findings Made By the District and Appellate Courts were Clearly Erroneous

At Response, p. 8 and 9, Petitioners' are accused of "arguing new and different facts and to argue the legal issue of personal jurisdiction only under their alternate scenario." Except for indeed, being one "alternate" scenario, this is incorrect.*

<*Petitioners raised Wis. Stats. 801.05 (5)(b) in the District Court in their Proposed Conclusions of Law of 3/19/91, p. 9, and alleged and argued, inter alia, that Bennett, and

Bennett on behalf of First Heritage, accepted substantial deposits from the Wisconsin residents in two seperate transactions, Id, at 7; that Defendant First Heritage did continuous and substantial business with Plaintiffs while Plaintiffs were in Wisconsin, Id,p. 6, and that these defendants (Respondents) knew that the invested funds would be borrowed from Wisconsin Banks, Id, at 6. The various signed contracts were Exhibits to the Complaint and were verified in the Stauffacher affidavit.>

In the Seventh Circuit, Wis. Stats. 801.05 (5)(b) was asserted as alternate grounds for personal jurisdiction in Appellants' Supplemental Authority for Case #91-3023; dated 4/10/92. Appellant argued the applicability of this statute -- ie, "services of providing loan guarantees in Wisconsin performed by the plaintiff on defendants' behalf, pursuant to written agreements and with their acknowledgement or ratification"-at length at oral argument.*

<*At argument there was also significant questioning on this precise issue from the panel of

judges.>

A.) The District Court summarily dealt with this "alternate theory" (Wis. Stats. 801.05 (5)(b) at Petition, p. 30(a):

> A.) "Neither Bennett nor First Heritage serviced the Plaintiffs in the State of Wisconsin".

This is true but it misperceives Petitioners' position.

B.) At Petition, p. 30(a), the District Court found that:

> "The trust arrangements did not require Bennett or First Heritage to perform any activites in Wisconsin."
>
> This is true but irrelevant.

C.) At 22 (a), the district court found:

> "It appears that plaintiffs are attempting to establish personal jurisdiction over defendants Bennett and First Heritage by examining their own actions. Specifically, borrowing money and depositing this money into First Heritage as concemplated by the agreements. It is a well established rule that 'unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the

forum state.' Hanson, at 253."[emphasis added]

This application of Hanson v. Denckla, 357 U.S. 235 (1958) is in direct conflict with Wis. Stats. 801.05 (5)(b) cited by Petitioners. The lower court failed to apply its own findings that it is Stauffacher who performed the credit provisions services in Wisconsin as contemplated by the agreements.

"[In Wisconsin], so long as the facts of the case are within Wis. Stats. 801.05, the novelty of the factual situation is not a sufficient basis for ruling that the Wisconsin long-arm statute is inapplicable to a situation. Moreover, nothing in the Wisconsin long-arm statute makes the motive for a defendants' activities determinative of the statutes application. If the defendant's actions fall withing language of the long-arm statute, and if they constitute sufficient "minimum-contacts" such that the maintainance of the suit does not offend traditional notions of "fair play and substantial justice", International Shoe v. State of Washington, 326 U.S. 310,316, (1945), then personal jurisdiction may be exercised over them:" Maney v.

Ratcliff, 399 F. Supp. 760,767, (E.D. Wis 1975).

D.) At Petition,p. 22(a), another clearly erroneous finding was made by the district court:

> "It must be further noted that none of the agreements contained a requirement that the plaintiffs borrow money from Wisconsin Banks."

This is clearly erroneous since the "Stauffacher Guarantee of Dolan Loan" agreement of 10/12/89 <Comp. Ex. #3> specifically required Stauffacher to guarantee Dolan loans of $1,500,000,including the $500,000 loan of 10/12/89 at First Wisconsin National Bank, an agreement acknowledged and/or ratified by Bennetts' signature in the 11/6/89 trust agreement <Comp. Ex. 4> , the $500,000 being deposited into First Heritage.*

<*In the Seventh Circuit, Petitioners objected to this particular finding at

Ap. BR.,p. 38. Unlike Respondents' contention at Response, p. 8, Petitioners also objected in the District Court to the District Court's "findings of fact" in their 5/29/91 Plaintiffs' Objection to Def. Bennett's Motion to Dismiss, p. 2 and 3.

Furthermore, Bennett's and First Heritage's dismissals of 5/31/91 were consolidated by a Stipulation for Dismissal which read, in part:

"The defendants' First Heritage Savings Credit Union and John Alexander Bennett do not oppose consolidation by plaintiff of a dismissal order applicable to Bennett with any appeal of the dismissal order applicable to First Heritage.">

Respondent submitts, at p. 10,

"Clearly, due process would have compelled both the District Court and the Seventh Circuit to dismiss this case on the facts found. The Stauffacher's cannot-and don't-dispute this. There tact is to argue new and different facts and argue the legal issue of personal jurisdiction under their alternate scenario."

The first part of this quote has some ominous logic. The second part just isn't correct. The review should be de novo. It would always be relativly easy to pick

through any foreign defendant jurisdictional dispute and find facts which go against jurisdiction. The Courts below should have applied those facts which support jurisdiction and resolved them in plaintiffs' favor. Wisconsin Electric Manufacturing Co, Inc. v. Pennant Products, Inc, 619 F.2d. 676, 677 n.1 (7th Cir. 1980) Further, Petitioners made a conscious and deliberate effort to only seek relief on claims under U.S. laws and over which Canada would not have exclusive jurisidction (i.e., Canada would have exclusive jurisdiction over title to mineral lease property.)

Respondent also contends, at Response, p. 19,:

> "There is no adequate factual basis which supports a further review. The jurisdictional issues were never pleaded or preserved for review."

Many of Respondents' "waiver" arguments

were also made to the Seventh Circuit, disputed by Petitioners and, apparently, rejected by the Seventh Circuit, especially Respondents' attempt to rely upon the "findings of fact" made by the District Court.

Further misstatement of the record is made by Respondents, in their Response, at p. 12:

> "The second joint venture agreement was to be supplemented by the terms of the first joint venture agreement and further stated that, at Bennett's election, it could serve as the trust agreement for the second mineral lease (Complaint, Exh. 3, para. 4D)." [emphasis added]

The written election option, however, was clearly Stauffacher's. (Comp. Exh. 3, para. 4D, Appellant's Appendix-7th Cir., p. A-98) Another error made by the District Court,and misstatement by Respondents at Response, p. 14, is to refer to the consent to jurisdiction

clause as a "choice of law" clause. The clause in the first Joint Venture Agreement Comp., Exh. #1 (which supplemented the terms of subsequent agreements between Petitioners and Respondents) read as follows:

> "20. Any controversey or claim arising out of or relating to this Partnership Agreement shall be settled by the Federal United States District Court of the Western District of Wisconsin."

This is consent to the jurisdiction of a particular District Court. This isn't an agreement to apply Wisconsin law where appropriate nor mere guidance on how to resolve a conflict of laws for some Canadian Court. Further, the trustee Bennett would clearly have been able to resort to the District Court in the Western District of Wisconsin to resolve some related controversies, a benefit to which he availed himself by participating

as trustee in these arrangements, and by acknowledging or ratifying the Second Joint Venture agreement and the Wisconsin loan guarantee agreement.*

<*First Heritage was acknowledged by Respondent First Heritage to be principal of agent Bennett for purposes of the motion to dismiss for want of personal jurisdiction. (..."defendant's reply will assume that Bennett was First Heritage's agent", Def. First Her.'s Response to Pltf's Proposed Findings of Fact (#9) dated 3/29/91, at p. 5; Accord, Dist. Ct. at Pet. Br.,p. 15 (a)) This ratification and acknowledgment by Bennett must, therefore, apply to First Heritage. Accordingly, First Heritage has purposefully availed themselves also.>

4.) Unlike Respondents' Position, Federal Securities Law (in Conjunction with Fed.R.Civ.Pr.4) Does Provide A Basis For Personal Jurisdiction

Unlike Respondents' contention at Response, p. 19, and the Seventh Circuit at Petition, p.9(a), a RICO plaintiff may rely on another federal jurisidctional statute for international service under Fed.R.Civ.Pr. 4 (e) and (f) (notwithstanding nationwide

service of process authorized by 18 U.S.C 1965 (b)). Omni Capital Int'l. Ltd. v. Rudolf Wolff and Co. Ltd., 484 U.S. 97, 104-105 (1978). The jurisdictional statute which gives Fed. R.Civ.Pr. 4 (e) and (f) a "boost" (allowing international service) is 15 U.S.C. 78 (a)(a). Brinks Mat. Ltd. v. Diamond, 906 F.2d. 1519, 1522, (11th Cir., 1990) recognized that State jurisdictional Statutes may also expand RICO jurisdiction under Fed.R.Civ.Pr. 4 (e), but did not hold that this was the only circumstance in which service of process allowed under 18 U.S.C. 1965 (b) could be exceeded. Further, Brinks did not hold that merely alleging a RICO claim would diminish the broad jurisidiction otherwise available under a separately alleged securities claim. 15 U.S.C. 78(a)(a) was raised below and Petitioners also cited, argued

and were questioned as to this concept at oral argument in the Seventh Circuit.

5.) Unlike Respondents' Contention, the District Court and Appellate Court did Base Decisions Upon Due Process Considerations

The District Court decided the motion primarily on a due process analysis:

> "Here, the plaintiffs invoke numerous provisions of the Wisconsin long-arm statute to demonstrate the appropriateness of personal jurisdiction. The contacts which Bennett and First Heritage had with the State of Wisconsin do not comport with due process. Because the tenants of due process have not been met there is no need to linger over the Wisconsin long-arm provisions." [Emphasis added] Pet. Br., p. 20 (a)

The trial court also acknowledged the existance of Bennett's signatures on the two trust agreements with the Petitioner as beneficiary. <Pet.Br., p. 17 (a) and 20 (a).> Without explanation, the Seventh Circuit, however, disregarded Bennett's two trust agreements. The only references

by the Seventh Circuit to Bennett were:

> "for the most part we shall not need to discuss Bennett, its [First Heritage's] employee, separately.."
>
> "All the credit union actually did... apart from occassional, unspecified, and seemingly trivial communications by Bennett, was to receive a deposit from a Wisconsonite." <Pet.Br., p. 3 (a)>

This completely disregards the two written trust agreements between beneficiary Stauffacher and Trustee Bennett of First Heritage. This seriously wounds the due process conclusions of the Seventh Circuit. <"The totality of First Heritage's U.S. contacts is too sparse to bring it within the grasp of the U.S. Courts"; Pet. BR., p. 9 (a)> The record in the District Court and submitted to the Seventh Circuit, as well as the argument in the Seventh Circuit, is repleat with references about the two written trust agreements.

The Seventh Circuit decision should be reviewed and clearly reversed. If an appellate court can disregard properly raised jurisdictional and controlling facts presented to arrive at its written opinions, we may get some future precedent for easy cases, but the tough cases will go unresolved and justice is denied to the litigant that had the right to appeal in the first place. 28 U.S.C. 1291; Fed.R.App.Pr. 4(a) (1). Such a case should also be reviewable as to both law and fact by the U.S. Supreme Court under whatever remains of U.S. Const., Art.III, Sec. 2, para. 2.

6.) Respondents' Other Contentions are Not Grounds for Denial of Certiorari

At Response, p. 6, Respondents cite Bishop v. Wood, 426 U.S. 341, 346 (1976) for the proposition that anytime a district and

appellate court agree on state law, the Supreme Court is foreclosed from review. This is incorrect, as Certiorari was granted to Bishop in Petition #74-1303; 423 U.S. 890 (1975) for the Supreme Court to review the constitutionaly of the lower courts' application. Furthermore, Bishop V. Wood, 426 U.S., at 346, n. 10, cites United States v. Durham Lumber Co., 363 U.S. 522 (1960) and Popper v. Clark, 337 U.S. 472, 486-87 (1948), noting that the Supreme Court will not defer if the conclusions are "unreasonable." In Stauffacher v. Bennett, the lower courts did not utilize the law cited by Petitioners <"There are other provisions of the long-arm statute but none remotely applicable." (7th Cir., Pet.Br., p.4 (a))> This is "unreasonable." The Seventh Circuit even disregarded the clearly supported findings made by the District

Court as far as the existance of the two trust agreements signed by Bennett and Stauffacher. This is manifestly "unreasonable".

Respondents also cite Turnock v. Cope, 816 F.2d. 332, 333 (7th Cir., 1987) for the proposition that:

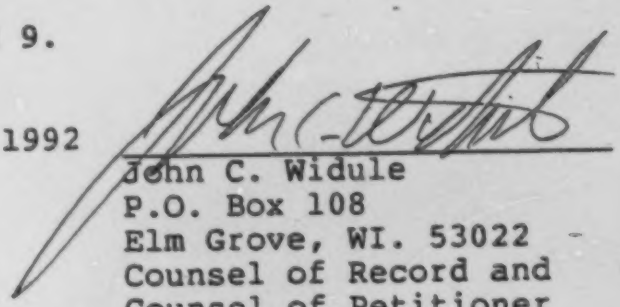
> "Because the (trial) court received proofs, it was not obligated to rely on the allegations of the complaint where those allegations were contradicted." <Resp. Br; p. 8>

Plaintiff filed no affidavits while defendant filed detailed affidavits in Turnock v. Cope, 816 F.2d., at 334. In Stauffacher v. Bennett, Petitioners filed the extensivly detailed complaint, reply, brief and affidavit with factual proofs. Respondents provided short, conclusory denials of Wisconsin contacts and stressed Canadian contacts. As the crow flies, Hope, B.C. is less than 30 miles from the

State of Washington where First Heritage admittedly has contacts with the U.S. Why, when First Heritage and Bennett do some business with Washington residents and get millions of dollars from and have 2 trust agreements with two Wisconsin residents is it unreasonable for the foreign defendants to anticipate that they might be haled into a U.S. Court? Globalization of business transactions made easy by telecommunications as we have it today would have been unthinkable in the days of International Shoe v. State of Washington, supra. The effect of the lower courts' rulings was to decide on the merits, even though the substantive liability to the plaintiff is supposed to be irrelevant. Wis. Stats. 801.03 (1) and Rose V. Franchetti, 713 F. Supp. 1203 (N.D. Ill., 1989). Stauffacher, who demanded a jury trial in the complaint,

should have been entitled to a jury trial on the substantive merits. U.S. Const. Amend. V, VII and XIV; Wis. Const. Art. 1, Sec 1, 5 and 9.

December 4, 1992



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